SUPREME COURT, U. S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-827

CYRUS T. ANDERSON, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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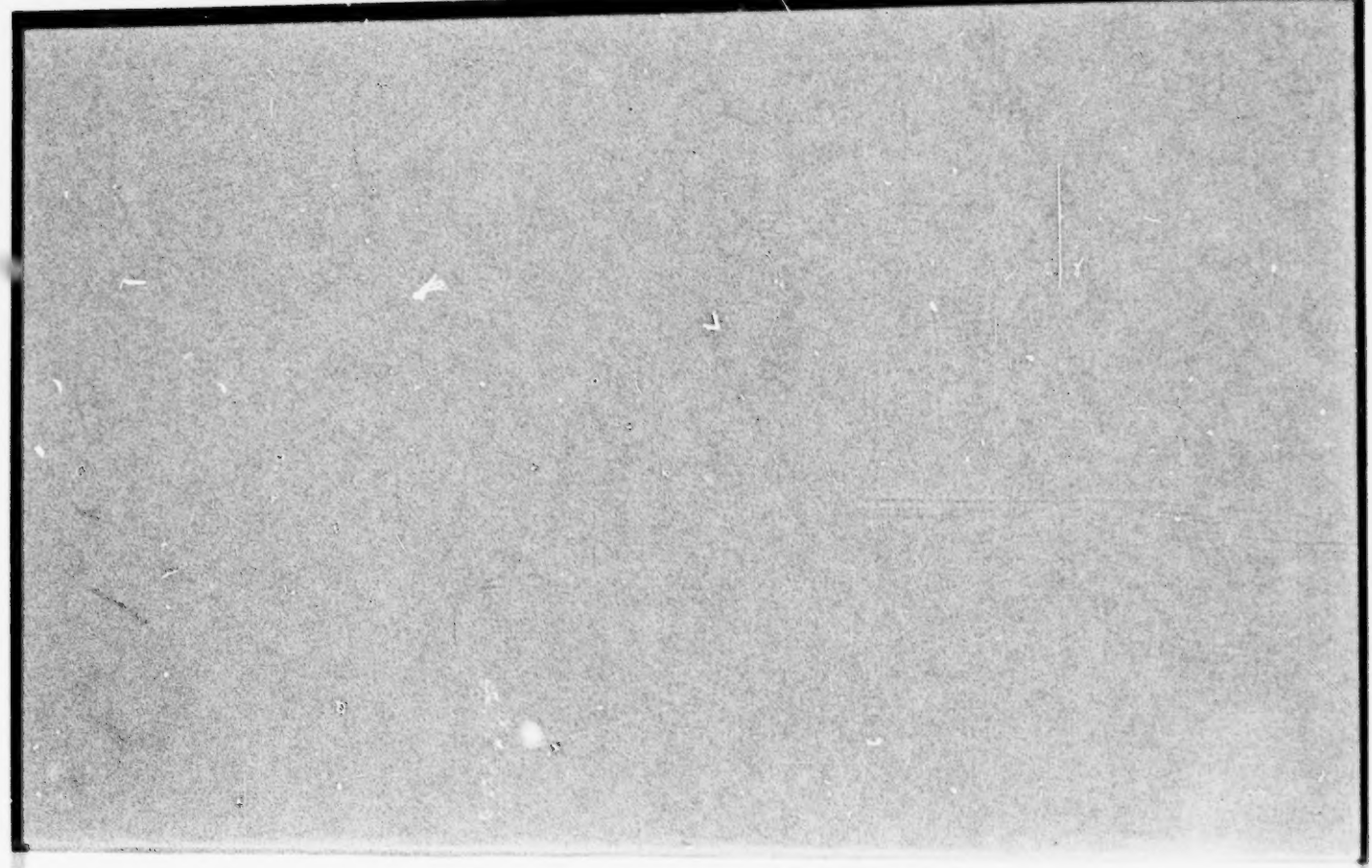

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Cyrus T. Anderson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-42a) is not yet reported. The judgment of conviction of the district court (App. B, *infra*, p. 43a) is unreported.

JURISDICTION

The judgment of the court of appeals was initially entered without opinion on October 22, 1974, and re-entered with opinion on November 12, 1974.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court's decision to have petitioner tried before a jury consisting solely of those who volunteered to serve in the case deprived petitioner of his Sixth Amendment right to trial by an impartial jury chosen from a cross-section of the community.

2. Whether petitioner was deprived of a fair trial because of the admission into evidence, over objection, of

(a) highly prejudicial, hearsay testimony by the government's principal witness that petitioner had attempted to bribe Senator Brewster on a prior, unrelated occasion; and

(b) surprise, perjured testimony of a critical witness, whose story was revealed only on the morning the trial began.

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[1] On petitioner's motion, alleging that he was unable to prepare and file a petition for rehearing or a petition for a writ of certiorari because the court of appeals had withheld an opinion, the court issued an opinion on November 12, 1974, and an accompanying order directing that the time for post-judgment actions be calculated from that date. The court of appeals subsequently stayed issuance of the mandate until January 2, 1975, and indicated that if a petition for a writ of certiorari were filed by January 2, 1975, the issuance of the mandate would be further stayed until disposition of the petition. Rule 41(b), F.R.A.P.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.

The federal statute dealing with "Bribery of public officials and witnesses," 18 U.S.C. 201, provides in relevant part as follows:

Section 201(b)(1):

> Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—
>
> (1) to influence any official act;
>
> * * *
>
> Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

Section 201(f):

> Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be per-

formed by such public official, former public official, or person selected to be a public official * * *

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT

Petitioner and then-Senator Daniel B. Brewster were jointly indicted for, respectively, offering and accepting bribes to influence Senator Brewster's actions, vote and decision on pending postal rate legislation, in violation of 18 U.S.C. 201 (App. 25-31). The indictment alleged that on three occasions in 1967, Senator Brewster received the sums of $5,000, $4,500, and $5,000 from petitioner and Spiegal, Inc.[2] in connection with efforts to limit proposed increases in postal rates that would adversely affect Spiegel's mail-order business (App. 25-31).[3]

Following various pre-trial motions[4] and related matters, the indictment came on for trial on October 27, 1972. At the pre-trial conference, the presiding judge advised all counsel that, because the trial would begin on the last day of the normal period of jury

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[2] Spiegel, Inc., which employed petitioner as a lobbyist, entered a plea of guilty after the trial had begun, and was severed from the further proceedings (Pet. App. A, p. 3a, fn. 7).

[3] "App." references are to the Joint Appendix filed in the court of appeals. "Tr." references are to those portions of the transcript of trial not included in the Joint Appendix.

[4] The trial judge originally dismissed the indictment as to Senator Brewster, concluding that his prosecution was barred by the Speech or Debate Clause of Article I, § 6 of the Constitution. This Court subsequently reversed that ruling. *United States* v. *Brewster*, 408 U.S. 501.

service, he would select the jurors from those members of the panel who volunteered to serve:

> Now, rather than call in a lot of jurors—that would be their last day of service normally—who would ask to be excused, and I would have to excuse them if they asked, I had the people over in the Jury Lounge ask this question, without identifying the case: We have a case starting October 30th that may take two weeks. Each of you is requested to ask that if you were chosen to serve on this jury for two weeks, would you be able to do so? And 68 of them, I believe, answered in the affirmative, all the rest of them, two or three-hundred, said no.

(App. 60). Counsel for petitioner objected to this procedure, but his further objections were summarily overruled by the trial court (App. 60-61).

The government's principal witness against Senator Brewster and petitioner was John F. Sullivan, a former aide to the Senator, who testified under a grant of immunity (App. 123-125, 205-207). Mr. Sullivan testified as to the facts surrounding the three meetings when petitioner explained the defects in the proposed legislation, and presented or promised campaign funds to Senator Brewster. Following the first of these meetings, Mr. Sullivan spoke to Senator Brewster, who allegedly

> said, well, I know Cy Anderson and back when I was a Congressman he tried to bribe me and I threw him out of my office.

(Tr. 128).

Objection was made to this hearsay and obviously prejudicial testimony (App. 128-129). The court denied a motion for a mistrial, instead cautioning the

jury that the statement was admissable "only as it relates to Senator Brewster and not as it relates to Spiegel or Anderson" (App. 129). Subsequently, however, the court ruled that the jury could consider any evidence of petitioner's "attitude towards obeying the law" in considering his guilt of the charges here.

Moreover, in closing arguments, the government again adverted to this prejudicial testimony, specificially relating it to petitioner:

> [Sullivan] said Senator Brewster told him that Mr. Anderson had come to his office and tried to bribe him and that Senator Brewster, then Congressman Brewster, had thrown him out of his office. Now that was in the late 'fifties.
>
> * * *
>
> So he [Anderson] went, he wanted [sic] to Senator Brewster, but back in 1950 he had already been to Senator Brewster and Senator Brewster had already thrown him out of his office, so what did he do? He sent Esther Coopersmith.

(App. 357-358). In this manner the court's initial instruction to relate the hearsay testimony only to Senator Brewster was effectively circumvented.

The government's other important witness was Betsey Norton. Although the joint "memorandum of conferences" which had served in lieu of discovery had indicated Mrs. Norton would testify only regarding the cashing of a check.[5], on the morning of the trial the

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[5] The memorandum stated the following regarding Mrs. Norton's proposed testimony:

> The government expects to show that Anderson sought reimbursement from Spiegel for the $5,000 and it came in the form of $5,000 check from Spiegel dated July 31, 1967 payable to the D.C. Committee for Maryland Progress. This check bears

government informed petitioner's counsel that her testimony would be that she was deeply involved in transferring funds to Senator Brewster (Pet. App. A, pp. 18a-19a). Counsel's request for a continuance to meet the completely unexpected testimony was denied (App. 78-84, 89-93).

Mrs. Norton then testified, *inter alia*, that in order to further the transfer of funds she went with petitioner to an airport in Kansas City, so that she could later identify a man named Criswell. She further testified that she never left the airport during the meeting (App. 269-270; Tr. 1657-1658). Both Criswell and petitioner testified that Mrs. Norton was not there, and a hotel receipt submitted on petitioner's motion for a new trial confirmed that Mrs. Norton had been at a Kansas City Hotel that morning (R. 87).[6]

Petitioner's defense to the indictment was, *inter alia*, that his activities involved nothing more than the legitimate and permissible efforts of a registered lobbyist to convince a member of Congress that proposed legislation was undesirable. Senator Brewster had publicly opposed higher postal rates for years, and

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the endorsement of Betsey Shipley Norton who will testify that she cashed the check and turned over the $5,000 cash to Anderson * * * in addition, the government expects to show that when Betsey Norton cashed the * * * check, Margaret Murphy was at the bank vouching for her.

(App. 41).

[6] The impact of Mrs. Norton's surprise testimony was considerably heightened by the fact that, in front of the jury, she refused to testify (App. 226-232). The jury was then taken out, and Mrs. Norton was jailed for contempt. Mrs. Norton returned to the courtroom after the government had closed its case, and the government was permitted to reopen the case to take her testimony (*Ibid.*).

petitioner had worked with him on other legislative matters. Both defendants testified that the campaign contributions were neither made nor received with any intent to influence the Senator's actions.

After being instructed by the trial judge regarding the differences between giving and accepting a bribe under sections 201(b),(c) and an illegal gratuity under section 201(f),(g) [7], the jury found petitioner guilty of bribery. Even though the government had emphasized in its case that petitioner and Senator Brewster had conspired together to give and receive the bribes (see R. 80; App. 375), the jury found Senator Brewster not guilty of receiving a bribe, but guilty of accepting an illegal gratuity.

On appeal of petitioner's conviction, the court of appeals affirmed (Pet. App. A, *infra*).[8] The court found no error in the trial judge's accepting only volunteers for the jury, emphasizing that no group was thereby "excluded" from the panel (Pet. App. A, p. 17a). The court viewed the cautionary instruction as adequate to protect petitioner from the prejudicial statement of Sullivan, and it commented that the "able" defense given petitioner belied any harm from denying a continuance to refute Mrs. Norton's testimony (Pet. App. A, pp. 23a, 32a).

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[7] The court refused to give two instructions, however, that were central to petitioner's theory that his activities on behalf of Spiegel with Senator Brewster were perfectly proper attempts to influence the Senator's vote (See Pet. App. A pp. 32a-34a).

[8] In a separate opinion, the court of appeals reversed the conviction of Senator Brewster, finding that the trial judge had been properly distinguished between the offenses of an illegal bribe, an illegal gratuity, and a legal campaign contribution. *United States* v. *Brewster*, C.A.D.C., No. 73-1305, decided August 2, 1974.

REASONS FOR GRANTING THE WRIT

This case raises an important question regarding the Constitutional validity, under the Sixth Amendmen't guarantee of an impartial jury and the Fifth Amendment's right to due process, of permitting a criminal defendant to be tried by a jury panel selected from those who have consciously volunteered to hear a major criminal trial. It thereby presents the Court with an appropriate opportunity to reconsider *Frazier* v. *United States*, 335 U.S. 497, a bare majority opinion subsequently described as "that weird and misguided decision." *Dennis* v. *United States*, 339 U.S. 162, 173 (Jackson, J., concurring). And it also involves the issue of whether the holding in *Peters* v. *Kiff*, 407 U.S. 493—that a defendant need not show actual prejudice where jury selection procedures are constitutionally invalid—should be applied to arbitrary jury selection methods not involving raciai discrimination. Cf. *White* v. *Georgia*, 414 U.S. 886 (Brennan, Douglas & Marshall, JJ, dissenting from denial of certiorari); *Ballard* v. *United States*, 329 U.S. 187, 195.

Certainly, it cannot be denied that these are vital issues, at a time when major criminal trials resulting from the Watergate and related investigation are receiving increased public attention. Jurors in these cases have been the subject of substantial publicity in the news media, and to an understandable human desire for attention, there is added in the District of Columbia the financial incentive of receiving full salary if the volunteer juror is a government employee. Such inducements to volunteer jury service and the possible resultant distortions affecting a defendant's right to trial by an impartial jury selected from a representative cross-section of the community warrant this

Court's review, both as a matter of Constitutional law and in the exercise of its supervisory power over the administration of justice in the federal courts. *McNabb* v. *United States*, 318 U.S. 332.

The need for review of this case by the Court, then, stems from the fact that "[a] fair trial in a fair tribunal is a basic requirement" of our Constitutional system. *In Re Murchinson*, 349 U.S. 133, 136. An all-volunteer system may be perfectly appropriate when the government is seeking to raise an army, but such an approach is completely improper when the government is selecting a jury. The petition for a writ of certiorari should be granted.[9]

1. The Sixth Amendment, with its express guarantee of the right to trial "by an impartial jury", and the Due Process Clause of the Fifth Amendment, have long been interpreted to require that a criminal defendant be tried by a representative jury "drawn from a cross section of the community." *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220. To insure that this essential right is accorded in fact as well as theory, this Court has cautioned the lower federal courts not to

> allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representa-

[9] While the propriety of using an all-volunteer jury involves the fairness of the tribunal, this Court should also review the manifest lack of fairness in the trial itself. The admission of and repeated references to an unrelated prior bribery attempt by petitioner are so inherently prejudicial that a new trial should have been granted.

> tive group * * * should be sturdily resisted. That the motives * * * may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right.

Glasser v. *United States*, 315 U.S. 60, 86. Selecting a jury from a venire composed solely of individuals who have volunteered to sit on a major criminal case for an extended period of time is, we submit, a flagrant example of a "method other than a process which will insure a trial by a representative group * * *."

Traditionally, of course, as the court of appeals concluded, the focus in Sixth Amendment cases has been upon the *exclusion* from jury service of a definable group. E.g., *Ballard* v. *United States*, *supra* (Exclusion of women); *Avery* v. *Georgia*, 345 U.S. 559 (Exclusion of blacks). But to take such a narrow view of the Sixth Amendment's scope is unwarranted, for it has been recognized that "the disproportionate *inclusion* of a particular group" in the venire equally threatens the representative nature of the jury. 8 *Moore's Federal Practice*, ¶ 24.02[2]. Indeed, the two situations are but opposite sides of the same coin; a jury, for example, which deliberately excludes women can be said to improperly include men. Regardless of whether the vice is viewed as improper exclusion or inclusion, the government may not "subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution * * *." *Peters* v. *Kiff*, 407 U.S. 493, 502 (Opinion of Marshal, J.).

The arbitrary and discriminatory nature of selecting a jury by limiting its composition to those volunteers who desire to hear an extended criminal case then re-

ceiving national attention[10] is obvious. Those who volunteer may well be motivated by feelings of civic duty,[11] but they may as well be motivated by the desire to participate in a famous, and in some respects landmark, criminal case. Or they may be motivated by the desire to continue to receive their full salaries, if employed by the government which is prosecuting the case.

That it may not be easy to define the precise values lost, when the small minority who volunteer to serve[12] entirely compose the jury, does not mean that the method of jury selection is not improper. As the Court recently has concluded:

> It is in the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce. For there is no way to determine what jury would have been selected under a constitutionally valid selection system, or how that jury would have decided the case.

Peters v. *Kiff*, *supra*, 407 U.S. at 504. And such an approach necessarily "deprives the jury system of the broad base it was designed * * * to have in our demo-

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[10] Although the trial court did not designate the case by name, the impending trial of Senator Brewster had received widespread media coverage, was imminent when the venire was asked if it wished to sit on an extended trial, and plainly the jurors could well have anticipated which trial the court was referring to.

[11] Although it would seem that having just completed a month of jury duty, most of the prospective jurors would be inclined to feel that they had fully exercised their civic responsibilities.

[12] When the trial court asked for volunteers, only sixty-eight veniremen accepted; between two and three hundred others declined to volunteer (App. 60).

cratic society." *Ballard* v. *United States, supra,* 329 U.S. at 195.

This Court has dealt on one prior occasion with the propriety of all-volunteer juries, and by the barest of majorities sustained the practice. *Frazier* v. *United States,* 335 U.S. 497.[13] There, as Justice Jackson put it in dissent (for himself and Justices Frankfurter, Douglas and Murphy), a substantial and long-standing "defect in the system" of jury selection existed because "when the panel of jurors was drawn, the court appears to have asked all those who did not wish to serve to step aside, and they were excused from serving." 335 U.S. at 516. As a result, "jury service is put on virtually a voluntary basis and qualified persons are allowed to decline jury service at their own option * * *." *Ibid.*

The dissenters then explained why such volunteer service necessarily distorted the composition of the jury, denying a defendant the impartial panel to which he is entitled by the Sixth Amendment:

> [I]n some jurisdictions [this method of selection] might produce no distortion of the composition of the panel; but is certain to do just that in the District of Columbia because of the dual standard and dubious method of jury compensation.

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[13] *Frazier* may well be factually distinguishable, for the Court was particularly concerned with the fact that the defendant had exercised his pre-emptory challenges to strike all the non-government employees on the prospective panel. 335 U.S. at 505-507. With regard to the method of selecting the jury, the Court majority concluded that the defendant had not established sufficient facts "to lay any foundation for valid attack upon the method followed in selecting the panel." 335 U.S. at 504. The majority therefore did not directly address the considerations raised by the dissent.

> The non-government juror receives $4 per day, which under present conditions is inadequate to be compensatory to nearly every gainfully employed juror. But the government employee is not paid specially; instead he is given leave from his government work with full pay while serving on the jury. The latter class are thus induced to jury service by protection against financial loss, while the former are subject to considerable disadvantage. This condition makes it obvious that, if jury service is put on virtually a voluntary basis and qualified persons are allowed to decline jury service at their own option, the panel will become loaded with government employees. If this undue concentration of such jurors were accomplished by any device which excluded non-government jurors, it unquestionably would be condemned * * * A system which has produced such an objectionable result and always tends to repeat it, should, in my opinion, be disapproved by this Court in exercise of its supervisory power over federal courts.

335 U.S. at 516-517. These problems the dissent in *Frazier* addressed are no less serious today, and may even be greater, for certainly those government employees who volunteer for jury service in major criminal trials involving the integrity of the government service itself cannot be wholly free from an interest in vindicating the service through a conviction.[14]

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[14] Given the procedural protections available to protect government employees from arbitrary dismissal, it seems more likely that the principal defect of including large numbers of volunteer government employes on juries in cases of this nature lies in the inevitable tendency to defend the integrity of government service by convicting the defendant. But since the government is paying the salaries of the jurors while they serve, it is also possible that "rational people could surely entertain the broad underlying premise that those dependent upon government for substantial income might be unsuitably conflicted if they served as jurors." *United States ex rel. Upton* v. *Nenna*, 318 F. Supp. 899, 904 (S.D.N.Y.).

Those who constitute a class that prefer not to serve on a jury for a major criminal trial are no less definable a category than, for example, wage earners, which "cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system." *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 223. Though certainly less obvious a class than, for example, women, they likewise have "qualities of human nature" and "a distinctive medley of views," resting upon their reticence to involve themselves in such cases, that is surely "indispensable if the jury is to comprise a cross-section of the community." *Healy* v. *Edwards*, 363 F. Supp. 1110, 1115 (E.D.La.), probable jurisdiction noted, 415 U.S. 911.

There remains only the question of whether petitioner must demonstrate some specific prejudice in order to be entitled to a new trial.[15] The answer, we submit, is clearly no, for "reversible error does not depend on a showing of prejudice in an individual case." *Ballard* v. *United States*, *supra*, 329 U.S. at 195 (Jury excluded women). Therefore, "even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that

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[15] The government argued in the court of appeals that petitioner had not objected to the method of jury selection. While the court of appeals expressly refused to reach that point (Pet. App. A, p. 15a), it fully dealt with the issue on the merits, and a fair reading of the transcript demonstrates that the objection was made and summarily overruled, precluding further discussion before the trial judge. In any event, plain and prejudicial error in the selection of the jury panel is reviewable even in the absence of a less than emphatic objection. Fed. R. Crim. Proc. 52; *United Brotherhood of Carpenters & Joiners of America* v. *United States*, 330 U.S. 395, 411-412; 8A *Moore's Federal Practice*, ¶ 52.03[2].

create the liklihood of the appearance of bias." *Peters* v. *Kiff*, *supra*, 407 U.S. at 502. Since the potential for harm that "is virtually impossible to" prove is so great, any doubt "should be resolved in favor of giving the opportunity for challenging the jury to too many defendants, rather than giving it to too few." *Id.*, at 504.[16]

2. This Court should also review the trial court's failure to grant petitioner a new trial when highly prejudicial, hearsay testimony was admitted against petitioner, and when the government's case rested upon the surprise testimony of a witness revealed to the defendant for the first time on the morning of the trial.

As indicated above (pp. 5-6), the government's principal witness was permitted to testify to a statement allegedly made by Senator Brewster that "back when I was a Congressman he [petitioner] tried to bribe me and I threw him out of my office" (App. 128). The court's cautionary instruction, that this testimony was only to be considered against Senator Brewster,[17] was subsequently ignored, both by the court and by the government, which in closing argument used this testimony against petitioner. It would be difficult to imagine a more damaging or prejudicial statement, in a trial for bribery of a public official, than

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[16] The volunteer system of jury selection used in this case is particularly indefensible because it was used for no other reason than to prevent a one-day delay in beginning the trial, already delayed for several years by Senator Brewster's appeal to this Court, so that the November complement of jurors would be available.

[17] As Judge Learned Hand once explained, a cautionary instruction is a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." *Nash* v. *United States*, 54 F.2d 1006 (C.A. 2).

a statement allegedly made by that official that the defendant had tried to bribe him on a previous occasion.

It is a fundamental proposition of criminal jurisprudence that the defendant's guilt may not be shown by the establishment in the prosecution's case-in-chief of a propensity to commit the type of crime alleged. As this Court said in *Michelson* v. *United States*, 335 U.S. 469, the government

> may not show the defendant's prior trouble with the law, specific criminal acts, or ill names among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.

Id., at 475-476; see McCormick, *Evidence* § 157 (1954 ed.). The use of Sullivan's hearsay, prejudicial testimony against petitioner simply cannot be permitted to contribute to petitioner's conviction.

In addition, we submit, the trial court erred in refusing to grant petitioner a continuance to meet the devastating testimony of Betsey Norton, previously supposed to be a minor government witness, who on the day of trial was revealed to the defense as providing testimony far beyond that suggested in the discovery memorandum agreed to by the government and petitioner (App. 41-51). The Court of appeals defense of this action, through a gratuitous reference to the able defense petitioner's counsel was able to conduct (Pet. App. A, p. 23a), hardly resolves this matter.

While the right to a continuance is "traditionally within the discretion of the trial judge," it is clear that "a myopic insistence upon expeditiousness in the face of a justifiable request for a delay can render the right to defend with counsel an empty formality * * * *". *Ungar* v. *Sarafite*, 376 U.S. 575, 589; *Chandler* v. *Fretag*, 348 U.S. 3; *White* v. *Ragen*, 324 U.S. 760. The right to assistance of counsel, conferred by the Fifth and Sixth Amendments, comprehends the right to adequate time for the preparation of a defense, inasmuch as "the denial of opportunity for * * * counsel to * * * consult with the accused and to prepare his defense" can render the employment or appointment of counsel "a sham and nothing more than a formal compliance with the Constitutional requirement * * *." *Avery* v. *Alabama*, 308 U.S. 444, 446; *Powell* v. *Alabama*, 287 U.S. 45.

Implicit in the right to adequate time for the preparation of a defense is the right to a reasonable continuance of the trial date to permit such preparation. For while

> the prompt disposition of criminal cases is to be commended * * * in reaching that result a defendant * * * must not be stripped of his right to have sufficient time to consult with counsel and prepare his defense. To do * * * [otherwise] is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob.

Powell v. *Alabama*, *supra*, 287 U.S. at 59. Therefore, "it is a denial of the accused's right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel * * *." *White* v. *Ragen*, *supra*, 324 U.S. at 763-64.

Admittedly, "[s]ince the Constitution nowhere specifies any period which must intervene between the

* * * [employment] of counsel and trial", the bare fact "standing alone, that a continuance has been denied does not constitute a denial of the constitutional right to assistance of counsel * * *." *Avery* v. *Alabama*, *supra*, 308 U.S. at 446. Accordingly,

> there are no mechanical tests for determining when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly the reasons presented to the trial judge at the time the request is denied.

Ungar v. *Sarafite*, *supra*, 376 U.S. at 589. Here, the reasons presented to the trial court for the requested delay and the reasons expressed by the Court for its refusal of a continuance clearly show a manifest abuse by the Court in the exercise of its discretion.

Counsel made it abundantly clear to the court that the government's stunning disclosure, literally on the eve of the trial, of its intention to submit through Mrs. Norton startling new evidence against petitioner which it had newly developed through its conversations with her, caught the defense by surprise and rendered nugatory some vital portions of its trial preparation (App. 52-58, 89-93). Further, the nature of the evidence to be adduced from Mrs. Norton was not even fully disclosed until the very morning of the trial, thus effectively preventing defense counsel from investigating its accuracy and preparing an effective cross-examination to meet it.[18] In addition, the task

[18] The court of appeals' suggestion that because Betsey Norton testified during the second week of trial, petitioner's counsel could have used the first week to investigate her story (Pet. App. A, p. 22a), is frivolous on its face. Counsel was, at that time, fully engaged in defending petitioner, cross-examining other government witnesses as they were presented.

was further complicated by the fact that Mrs. Norton's own counsel had forbade her to discuss the case with defense counsel in the few hours prior to trial.

Given the crucial role of Mrs. Norton's testimony to the government's case, it is clear that fundamental fairness required at least a brief continuance to enable defense counsel to prepare for this newly-developed testimony. The Court's failure to allow that continuance constituted an abuse of its discretion, which this Court should rectify.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January, 1975

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1304

UNITED STATES OF AMERICA

v.

CYRUS T. ANDERSON, APPELLANT

Appeal from the United States District Court
for the District of Columbia

(D.C. Crim. No. 1872-69)

Decided November 12, 1974

Richard W. Boone, with whom *Walter J. Bonner*, *Edward C. O'Connell* and *William H. Seckinger*, were on the brief, for appellant in No. 73-1304.

Stuart M. Gerson, Assistant United States Attorney, with whom *Harold H. Titus, Jr.*, United States Attorney at the time the brief was filed and *John A. Terry*, Assistant United States Attorney, were on the brief for appellee. *Earl J. Silbert*, United States Attorney and *James E. Sharp*, Assistant United States Attorney, at the time the record was filed, also entered appearances for appellee.

Before TAMM, ROBINSON and WILKEY, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: Cyrus T. Anderson contests his conviction by a jury on three counts of bribery of a United States Senator.[1] His main argument is that he was deprived of a fair trial as the result of surprise and perjury in connection with the testimony of Betsey Shipley Norton, a key witness for the Government.[2] Anderson also advances other grounds for reversal, each of which we address in the course of this opinion.[3] We find Anderson's arguments unpersuasive, and accordingly affirm the conviction on all counts.

I. THE FACTUAL BACKGROUND

Anderson was a registered congressional lobbyist for Spiegel, Inc.,[4] a Chicago-based merchandiser.[5] Since Spie-

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[1] The statutory predicate for the conviction is 18 U.S.C. § 201(b) (1970), which in relevant part provides:

> Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . , or offers or promises any public official . . . to give anything of value to any other person or entity, with intent—
>
> (1) to influence any official act . . .
>
> Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

By 18 U.S.C. § 201(a) (1970), "public official" includes a Member of Congress.

[2] We resolve this contention in Parts III(A), (C), *infra*.

[3] We deal with Anderson's other claims in Parts II, III(B), IV, V, *infra*.

[4] Hereinafter we refer to Spiegel, Inc., as "Spiegel." Two individuals having the surname "Spiegel" are later mentioned. We cojoin their first names to distinguish them.

[5] Anderson had been so employed by Spiegel since about 1959. In addition to his salary, Anderson was provided with

gel conducted its sales primarily through the mails, its financial well-being was directly related to the level of third-class mail rates. Daniel B. Brewster was a United States Senator, and a member of the Senate Committee on Post Office and Civil Service. It was the alleged bribery of Brewster by Anderson, as the *alter ego* of Spiegel, that gave birth to this litigation.

The theory of the prosecution was that Anderson on several occasions delivered monies to Brewster with corrupt intent to influence his action on postal-rate legislation coming before him in his official capacity. An indictment so charged,[6] and the jury, at Anderson's trial jointly with Spiegel[7] and Brewster,[8] found Anderson

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a $30,000-per-year account usuable for contributions to District of Columbia committees for educational and voter-registration purposes. As we shall see, that account could not accommodate the monetary payments which Anderson allegedly made to Brewster.

[6] In original form, the indictment charged in five counts five separate payments as bribery by Anderson. Two of the counts were dismissed and the remaining three, on a renumbered indictment, were submitted to the jury, which convicted on each. The indictment similarly charged Brewster's receipt of the same payments as bribery by him. But see note 9, *infra*.

[7] After the trial got under way, Spiegel entered pleas of guilty to making unlawful payments of gratuities, in violation of 18 U.S.C. § 201(f) (1970), as lesser offenses included in two counts charging bribery. See *United States* v. *Brewster*, No. 73-1305 (D.C. Cir. Aug. 2, 1974). After the verdict against Anderson was returned, a $10,000 fine was imposed on each count.

[8] Previously, on Brewster's motion, the indictment had been dismissed as to him on the ground that prosecution for the acts charged to him was barred by the Speech or Debate Clause, U.S. Const. art. I, § 6. On the Government's appeal, the Supreme Court reversed that ruling. *United States* v. *Brewster*, 408 U.S. 501 (1972).

guilty as charged.[9]

The Government's case against Anderson, and by the same token the jury's verdict, rested notably upon the testimony of John Francis Sullivan, formerly an aide to Brewster,[10] and Betsey Shipley Norton, a close friend of Anderson.[11] Primarily through these two witnesses, the Government sought to prove the execution of a scheme designed to route payments from Spiegel through Anderson to Brewster and to a nominal campaign committee for him. We need not recite in full the maze of details comprising the conflicting testimonial versions of the questioned transactions. Rather, we recount only so much of the evidence, pro and con, as will bring into sharp focus the several points Anderson raises on this appeal.[12]

A. *The Sullivan Testimony*

Testifying under a grant of immunity from prosecution, John Sullivan delineated for the jury a series of contacts between Anderson, Brewster and himself, in the course of which the events germinating the bribery counts against Anderson assertedly transpired.[13] What

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[9] See note 6, *supra*. Brewster also was convicted, not of bribery, but of receiving illegal gratuities, 18 U.S.C. § 201(g) (1970). We have, on his appeal, reversed his conviction and remanded his case for a new trial because of misinstruction of the jury as to him. *United States* v. *Brewster*, *supra* note 7.

[10] Sullivan was Brewster's executive assistant, and later his administrative assistant, during the period 1963-69.

[11] Further details are summarized in Parts III(A), (C), *infra*.

[12] Including, of course, the contention that the evidence was legally insufficient to support Anderson's conviction. See Part IV(C), *infra*.

[13] Testimony given by other witnesses tended to corroborate Sullivan's version of these events.

follows is a summary of Sullivan's testimony in that regard.

Late in 1965, a political fundraiser visited Brewster at his Senate office in Sullivan's presence. Brewster was nearing the end of his term and, though not then an announced candidate, he contemplated a run for reelection. The visitor mentioned a proposal by the Postmaster General to increase mail rates, and Brewster said that he had no fixed opinion on the merits of the proposal. The visitor then told Brewster that if he remained uncommitted on the subject, she could get money for his reelection campaign from Anderson.[14] Brewster suggested that Anderson call Sullivan in that connection.[15]

In January, 1966, Sullivan received a telephone call from Anderson, who stated his understanding that Brewster "was going to keep an open mind" on the rate-increase proposal and said that he "was sending something" to the office. A few days later a check for $5,000 arrived, addressed to Brewster's earlier visitor. The check was drawn by the Hotel and Restaurant Employees and Bartenders International Union of Cincinnati, Ohio,[16]

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[14] Brewster stated that, as a yet unannounced candidate, he could not accept campaign contributions. The visitor told him that "that is no problem," and suggested that he seek advice as to organization of a committee in the District of Columbia "where you can put the money."

[15] That suggestion foreran one of the problems presented on appeal, which we discuss in Part IV(A), *infra*.

[16] Additional details regarding the check were supplied by other testimony. Anderson, the Bartenders Union's legislative representative in Washington, asked the union to contribute the $5,000, stating that Brewster was interested in the committee and that the money would be devoted to education and voter registration in Maryland. Anderson gave instructions as to the amount of the check, the payee, and to whom it should be sent. There had been no prior dealings between Brewster and the union, but Anderson had been instrumental

and was made payable to the "D.C. Committee for Maryland Education" (DCCME).[17] The check was deposited in a bank account opened in the name of DCCME, which became a committee to accept campaign contributions for Brewster.[18]

A year passed without any other known contact by or with Anderson. In January, 1967, however, Anderson conferred with Brewster and Sullivan in their Senate offices. Anderson revealed his connection with Spiegel [19] and voiced Spiegel's opposition to higher postal rates. As the meeting drew to a close, Anderson gave Brewster an envelope containing $5,000 in cash, and Brewster told Anderson that he "would do all he possibly could to be of assistance to Spiegel . . . ." The $5,000 was placed in a safe in Sullivan's office, and was subsequently used for cash expenditures.[20]

On April 5, 1967, a bill seeking postal-rate raises was introduced in Congress. Shortly thereafter, Anderson obtained from Spiegel a check for $13,500 payable to DCCME and, with help from Betsey Norton,

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in securing passage of legislation favored by the union and for that reason it felt that Anderson's request should be honored.

[17] The organization known as DCCME was nonexistent when the check arrived, but shortly thereafter Brewster decided to animate it as a District of Columbia campaign organization not, at that time, required to report campaign contributions. Sullivan was made president of DCCME and a political supporter of Brewster became its treasurer.

[18] This transaction was the subject of one of the five bribery counts against Anderson, but the count was later dismissed for the stated reason that Spiegel had no connection with it.

[19] See note 5, *supra*, and accompanying text.

[20] This transaction was the subject of one of the counts on which Anderson was convicted.

converted it into cash.[21] Later that month Anderson, accompanied by a man introduced as Morris Spiegel,[22] again called on Brewster and Sullivan. There was discussion of the pending bill, during which Morris Spiegel handed an envelope to Brewster. Inside the envelope was $4,500 in cash, which also found its way into the DCCME bank account.[23]

A third payment was made in July, 1967. On Brewster's order, Sullivan telephoned Anderson and inquired as to whether any more money would be forthcoming. Anderson answered "yes, he did have some more money, for the Senator—five thousand dollars—but he had not received a check from Spiegel in Chicago, yet." After receiving several more telephone calls from Sullivan, Anderson went to Sullivan's office and made out a personal check for $5,000, leaving the name of the payee blank.[24] Sullivan wrote in DCCME as payee and later deposited it in DCCME's account.[25]

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[21] Anderson asked Ms. Norton to cash the check for him, and instructed her to endorse the check "B. A. Shipley," her maiden name, as secretary-treasurer of DCCME. Ms. Norton did that and brought to Anderson the $13,500 in cash.

[22] No connection between Morris Spiegel and the Spiegel Company is ascertainable.

[23] This transaction was the subject of another count on which Anderson was convicted.

[24] Somewhat later, Anderson received a $5,000 check from Spiegel payable to the "Committee for Maryland Progress," a nonexistent organization. Pointing out to Betsey Norton that the check should have been made out to DCCME, and explaining that he had already given his own check to DCCME, Anderson arranged for her to cash the Spiegel check for him. She did so, signing her name as "Shipley," and delivered the cash to Anderson.

[25] This transaction furnished the basis for the third count on which Anderson was convicted.

B. *The Norton Testimony*

Though, like Sullivan, the recipient of a grant of immunity, Betsey Norton [26] remained an outwardly reluctant witness.[27] Nonetheless, her initial effort to avoid testifying having failed,[28] the Government called her to the witness stand as the second week of trial began. Disregarding for the moment further difficulties in securing her testimony, which generate some of the issues on appeal,[29] we relate the highlights of that testimony.

Ms. Norton met Anderson in 1965. A close friendship developed, and she frequently assisted Anderson in his

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[26] This was the witness' name at the time of trial. Until her remarriage in September, 1967, her surname, by virtue of an earlier marriage, was Fidler. Shipley was her maiden name.

[27] Two days before the commencement of trial the prosecutor learned, for the first time, that Ms. Norton knew a great deal more about payments by Anderson and Spiegel than she had previously disclosed in testimony before the grand jury. This the prosecutor promptly made known to defense counsel and the court. In order that Ms. Norton's testimony might be compelled, she was granted immunity from prosecution, but thereafter she nonetheless moved to quash the subpoena outstanding for her attendance as a witness. The trial judge, after full hearing, found that the prosecutor had committed no impropriety in obtaining additional information from her, and ruled that her testimony would be admitted. But though sheathed with immunity, Ms. Norton was still recalcitrant; on direct examination, she suddenly announced that she would not testify further. An admonition by the judge out of the jury's presence did not help, and the judge finally adjudged her in contempt. After overnight incarceration and consultation with her attorney, Ms. Norton recanted and, over objection by the defense, was permitted to resume her testimony. She later explained to the jury that she had been motivated by a desire to protect Anderson, who had always treated her well.

[28] See note 27, *supra*.

[29] See note 27, *supra*, and Parts III(A), (B), (C), *infra*.

projects. She became aware of his employment by the Spiegel company and attended some of his meetings with Modie Spiegel, its chief executive officer, in Chicago and Washington.

Over a period of three years, at Anderson's request Ms. Norton cashed a number of Spiegel checks for him, including two related to contributions to DCCME.[30] On occasion Modie Spiegel, unable to contact Anderson, telephoned her to confirm delivery of "the package"– money obtained by cashing Spiegel checks, some of which had been earmarked for Brewster.[31] For her cooperation she was rewarded in 1968 when Anderson importuned Modie Spiegel to arrange a mortgage on her home.

Anderson, Ms. Norton avowed, canvassed the members of the Senate Committee on Post Office and Civil Service in 1967 to ascertain their views on the pending rate-increase legislation. There was also a discussion between Anderson and Modie Spiegel in her presence regarding the response by Brewster, himself a committee member. Brewster had indicated a position favoring low-level third-class postal rates, and had already received $5,000 from Spiegel. Anderson felt, however, that additional payments were needed to insure his continued support.

Ms. Norton remarried[32] and moved to New York in September, 1967, but she often returned to Washington, and she continued to see Anderson through the fall of 1968. When the grand jury investigation in the instant case got under way, Anderson told her that she probably would be called as a witness, and reviewed with her the substance of the testimony she should give. Anderson

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[30] See notes 21, 24, *supra*, and accompanying text.

[31] See notes 21, 24, *supra*, and accompanying text.

[32] See note 26, *supra*.

also requested her to name John Criswell, then treasurer of the Democratic National Committee, to convey the impression that

> . . . Mr. Criswell was a part of this so it would look like it was part of the Democratic National Committee rather than just a direct thing from Spiegel to Anderson to whomever the monies went for.[33]

To this end, Anderson arranged for Ms. Norton to meet Criswell in order to assure her ability to identify him if asked to do so by the grand jury. She flew from Washington to Kansas City for that purpose, observed Criswell at an airport there for five minutes, and returned to Washington later on the same day. This testimony was to become an important point in Anderson's argument for reversal of his conviction.[34]

C. *The Defense*

Anderson took the witness stand in his own behalf.[35] He described for the jury the role of a congressional lobbyist, and acknowledged an introduction to Brewster and the campaign contribution to him in January, 1966.[36] At the behest of Brewster's late-1965 visitor,[37] Anderson said, he solicited the $5,000 check from the Bartenders

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[33] In an effort to impeach Ms. Norton in this regard, the defense exposed her grand jury testimony that Anderson and Criswell told her to cash the $13,500 check and deliver the proceeds to either or both of them. At trial, Ms. Norton maintained that she gave the money to Anderson alone.

[34] See Part III (C), *infra*.

[35] In some respects, Anderson's testimony was corroborated by Brewster. The evidence as to Brewster is summarized in our recent opinion in his case. *United States* v. *Brewster*, *supra* note 7.

[36] See text *supra* at notes 16-18.

[37] See text *supra* at notes 14, 15.

Union and at Sullivan's direction had it made out to DCCME.[38]

Anderson denied any meeting with Brewster or Sullivan in January, 1967,[39] or any discussion attended by Morris Spiegel in April of that year.[40] He admitted, however, an April meeting with Brewster on behalf of the Spiegel company,[41] and claimed that the cash then given to Sullivan was his own contribution—and not one by Spiegel—in the amount of $7,500, not $4,500 as stated by Sullivan.[42] Anderson also admitted that in July, 1967, he delivered to Sullivan his personal check for $5,000, on which Sullivan then entered DCCME as payee,[43] because Sullivan had called him and urgently requested money.[44]

Anderson further testified that he was given the $13,500 Spiegel check,[45] but that he never contemplated its

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[38] See note 16, *supra*, and accompanying text.

[39] See text *supra* at notes 19-20. His claim that he made no contribution to Brewster during that month is specifically corroborated by the latter's testimony.

[40] See text *supra* at notes 22-23. Brewster's testimony tends to corroborate on this point.

[41] See text *supra* at note 23.

[42] While, at trial, Anderson said the $7,500 was turned over at a luncheon, a letter Anderson wrote to the United States Attorney after his grand jury appearance recited that the money was given to Brewster in his office. The contribution was made in cash, Anderson testified, conformably with long standing Capitol Hill custom. Brewster's testimony acknowledges receipt of $4,500 of the money, and suggested that the contribution was a personal one and that there was no ongoing discussion of postal legislation when the money was handed to him.

[43] See text *supra* at notes 24-25.

[44] Brewster testified similarly.

[45] See note 21, *supra*, and accompanying text.

use for Brewster or DCCME. The check was drawn in favor of DCCME, Anderson said, simply as a means of enabling conversion of the check to cash. Then, Anderson continued, he turned the $13,500 over to John Criswell in cash, as part of approximately $50,000 which Anderson had pledged to raise for the Democratic National Committee.[46]

Anderson also undertook to explain to the jury the part Ms. Norton played in the affair.[47] By his arrangement, she cashed the $13,500 check to DCCME [48] and the $5,000 check to the D.C. Committee for Maryland Progress.[49] Those checks, Anderson said, were funneled through DCCME and cashed by Ms. Norton to avoid any appearance, from his own endorsement thereon, that the monies represented taxable income to him.[50]

Anderson also leveled an attack on Betsey Norton's credibility,[51] and not the least her claim that she met

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[46] Criswell's testimony tended to support Anderson in this regard, though Criswell admitted that he had told the grand jury that Anderson raised about $40,000 in 1966-67. Anderson stated that his grand jury testimony that Criswell received the $13,500 check was a product of confusion on his part.

[47] Anderson said that during 1967 he knew Ms. Norton only as Betsey Fidler, and was unaware of her maiden name "Shipley." See note 26, *supra*. Anderson was contradicted by three Spiegel checks for campaign committees with which Brewster had no connection, which bore Ms. Norton's endorsement in the name "Shipley."

[48] See note 21, *supra*, and accompanying text.

[49] See note 24, *supra*.

[50] The Government, however, produced three Spiegel checks drawn payable to campaign committees unrelated to Brewster, each of which checks bore Anderson's endorsement in some variation of his given name.

[51] One prong of Anderson's attack was an allegedly false claim by Betsey Norton that she was pregnant with his child.

Criswell in Kansas City.[52] Anderson stated that he went to Kansas City and at an airport there discussed with Criswell the grand jury's interest in Anderson's fund-raising activities. Anderson testified further that Ms. Norton accompanied him on the trip, but declared that she never saw Criswell because, he said, "[s]he was back at the Muhlbach Hotel" at the time.[53] John Criswell also testified to the airport meeting, stating "[t]o the very best of [his] knowledge" that Ms. Norton was not present.[54]

The evidentiary and argumentative presentations at trial covered a period of more than two weeks. The trial judge submitted the case against Anderson and Brewster[55] to the jury on six counts—three counts of bribery against each.[56] The jury was instructed that the range of permissible verdicts on each of these counts was guilty of bribery, guilty of unlawfully accepting gratuities, or not guilty. The jury found Anderson guilty of bribery on all three counts against him, and Brewster

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Anderson stated that the claim was made shortly after her remarriage in 1967 and that thereupon he executed a written acknowledgement of paternity incorporating a guaranty of the child's support. In this respect Anderson was corroborated by two other witnesses. Four months later, Anderson said, Ms. Norton told him that she had miscarried and he gave her all copies of the acknowledgement, retaining no documentation for himself. At trial, Ms. Norton steadfastly denied any sexual intimacy with Anderson.

[52] See text *supra* at notes 32-34.

[53] We elaborate upon this in Part III(C), *infra*.

[54] Previously, however, in a statement to the Federal Bureau of Investigation, Criswell had said that Anderson possibly was accompanied by a friend at the airport.

[55] See note 7, *supra*.

[56] See note 6, *supra*.

of thrice receiving gratuities unlawfully.[57] Anderson's post-verdict motion for a new trial was denied,[58] a judgment of conviction was entered, terms of imprisonment and fines were imposed,[59] and Anderson appealed. We have heretofore entered our judgment affirming Anderson's conviction, noting that this opinion would follow.

II. The Jury

Anderson's trial was scheduled to begin on October 30, 1972, the last day of service scheduled for the District Court's complement of petit jurors for that month. To avoid difficulty for any juror from a relatively lengthy extension of the period of service, the trial judge addressed to the jurors a general inquiry designed to ascertain how many would be able to serve beyond the normal expiration of their term.[60] The jurors were told that a trial starting October 30 might require two weeks, and neither the case nor its subject matter was identified. A total of 68 of some 200 to 300 jurors answered affirmatively.

The judge then asked counsel whether there was any objection to calling 60 of those indicating continuing availability as the panel from which the jury for the trial would be chosen. Anderson's counsel stated that he would "abide by the majority vote of defense counsel"

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[57] See *United States* v. *Brewster*, *supra* note 7.

[58] See Parts III, IV, V, *infra*.

[59] On each count Anderson was sentenced to imprisonment for six to eighteen months and to pay a fine of $10,000, the sentences to operate consecutively and cumulatively.

[60] "In any two-year period, no person shall be required to . . . serve or attend court for prospective service as a petit juror for a total of more than thirty days. . . ." 28 U.S.C. § 1866(e) (1970).

but simultaneously suggested that "it might be best to start with a new jury" the next day. There was additional discussion but no further objection,[61] and the judge proceeded in accordance with the plan he had indicated.

We are now confronted with Anderson's contention that the procedure by which the 60-member panel of prospective jurors was obtained deprived him of a trial jury representative of the community. The panel, he says, was composed of "volunteers" "who expressed their desire to serve"—"people who had no responsibilities which would be seriously impaired by their absence from their normal routines for a period of several weeks"; a jury so constituted, Anderson argues, "was not an adequate cross-section of the metropolitan community upon which to try the sophisticated issues of this major criminal case."[62]

To be sure, Anderson was entitled to trial by a jury selected from a body truly representative of the community.[63] However, his characterization of the composition of the jury panel utilized in this case is far from accurate. There is not the slightest hint that the October complement of jurors—from which came the 60-member panel, and ultimately the jury for his trial—was other

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[61] The Government argues that failure to appropriately raise an objection to the trial judge's proposal forecloses consideration of an objection now. See, *e.g.*, Fed.R.Crim.P. 51; *Washington* v. *United States*, 134 U.S.App.D.C. 223, 225, 414 F.2d 1119, 1121 (1969); *Miller* v. *Avirom*, 127 U.S.App.D.C. 367, 369, 384 F.2d 319, 321 (1967). In any event, as we conclude, Anderson's point is substantively deficient.

[62] Brief for Appellant at 27.

[63] 28 U.S.C. § 1863(b)(3) (1970); *Thiel* v. *Southern Pac. Co.*, 328 U.S. 217, 220 (1946); *Glasser* v. *United States*, 315 U.S. 60, 85-86 (1942); *Smith* v. *Texas*, 311 U.S. 128, 130 (1940); *Ware* v. *United States*, 123 U.S.App.D.C. 34, 37, 356 F.2d 787, 790 (1965), *cert. denied*, 383 U.S. 919 (1966).

than a fair cross-section of residents of the District of Columbia. Neither the panel nor the trial jury became any the less so by reason of the technique the judge employed. To say, as Anderson does, that the trial jurors had no responsibilities in competition with jury service is to indulge in speculation in an area wherein proof is an indispensable prerequisite.[64] Moreover, jury service in this age involves almost inevitably some sacrifice of personal pursuits; without people willing to devote some of their time and energy, the jury system would grind to a halt. The traditional response of the populace to the call to this public duty belies the notion that those who respond have nothing else of importance to do.

Nor, by our understanding, was the trial judge's methodology in this case an appeal to the outgoing body of jurors for volunteers.[65] The effort, rather, was to avoid imposition of an unexpected burden upon jurors who could ill afford to continue beyond the period for which they had been summoned to serve. Certainly the judge would have been justified in excluding any of those in the 200-odd category who might individually have shown undue hardship, even during the term of regular service.[66] Here the endeavor was to eliminate the tedious process of examining one by one the obviously large group who would seek to be excused for that reason.

In separating those who could from those who could not afford to expand their service, the judge did not

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[64] See *Frazier* v. *United States*, 335 U.S. 497, 503-04 (1948), and cases there cited.

[65] See *id.* Jurors are not freed from service simply by expiration of the normal period of service. See note 60, *supra*.

[66] *Thiel* v. *Southern Pac. Co.*, *supra* note 64, 328 U.S. at 224; *United States* v. *Kelly*, 349 F.2d 720; 778-79 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966); *Grech* v. *Wainwright*, 492 F.2d 747, 749 (5th Cir. 1974).

exclude anyone or any cognizable group.[67] The sole criterion he employed was ability to serve longer; the panel from which the jury was drawn was distinguished only by that quality. We think a trial judge's discretion in jury selection[68] is broad enough to encompass consideration of adverse consequences which might be suffered by jurors suddenly called to a duty prolonged materially beyond their original expectations.

III. The Witness Norton

We next address a brace of arguments for reversal which center on the testimony and testimonial conduct of Betsey Norton. One relates to the trial judge's ruling that Ms. Norton would be admitted as a witness, and the judge's concomitant refusal of a continuance, after it became known that her testimony would be far more extensive than had been anticipated.[69] Another pertains to the denial of a motion for a mistrial after the judge had held Ms. Norton in contempt.[70] Still another asserts perjury in her testimony that she met and observed John Criswell at the airport in Kansas City.[71] We discuss these aspects of the appeal in turn.

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[67] Compare *Frazier* v. *United States*, *supra* note 64, 335 U.S. at 504; *Thiel* v. *Southern Pac. Co.*, *supra* note 64.

[68] See, *e.g.*, *Katz* v. *United States*, 321 F.2d 7, 8-9 (1st Cir.), *cert. denied*, 375 U.S. 903 (1963); *United States* v. *Bowe*, 360 F.2d 1, 9 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966); *Rabinowitz* v. *United States*, 366 F.2d 34, 50 (5th Cir. 1966).

[69] See note 27, *supra*.

[70] See note 27, *supra*.

[71] See text *supra* at notes 33-34.

A. *The Surprise Element*

In lieu of formal pretrial discovery procedures, defense counsel utilized a series of discussions with Government counsel as the means of obtaining information. The results of these efforts were incorporated in a jointly prepared "memorandum of conferences," upon which the defense relied in preparing for trial. Betsey Norton's grand jury testimony had been limited to the cashing of DCCME checks under the name "Shipley" and transferring the proceeds to Anderson,[72] and seemingly counsel on neither side had reason to believe that she knew more. Accordingly, the parties' memorandum reflected the expectation that her participation in the trial would be small.[73]

On the Saturday preceding the opening of trial,[74] the prosecutor learned for the first time that Ms. Norton was more than a courier in check-cashing, and that she professed to know a good deal about payments by Spiegel through Anderson to Brewster. At that time she revealed to the prosecutor new information regarding her involvement with Anderson, Spiegel and Criswell in the transfer of funds to Brewster and others. She indicated

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[72] See text *supra* at notes 21, 30 and notes 21, 24, *supra*.

[73] As to Ms. Norton, the memorandum provided merely:

> The government expects to show that Anderson sought reimbursement from Spiegel for the $5,000 and it came in the form of a $5,000 check from Spiegel dated July 31, 1967 payable to the D.C. Committee for Maryland Progress. This check bears the endorsement of Betsey Shipley who will testify that she cashed the check and turned over the $5,000 cash to Anderson. . . . In addition, the government expects to show that when Betsey Shipley cashed the . . . check, Margaret Murphy was at the bank vouching for her.

[74] The date was October 28, 1972. Trial was scheduled to begin on the following Monday, October 30.

that her failure to divulge the information sooner stemmed from fear of prosecution, and of banishment from employment for betrayal of a confidence.

Armed with this knowledge, the prosecutor alerted defense counsel on Sunday that he had additional evidence to strengthen the Government's case.[75] On Monday morning, one hour prior to commencement of trial, the prosecutor conferred with defense counsel and summarized for them Ms. Norton's amplifications. As soon as a jury was selected, defense counsel moved for a ruling excluding Ms. Norton as a trial witness and, alternatively, invoking Federal Criminal Rule 16(g),[76] also moved for a continuance. The trial judge denied these motions.

Anderson does not seriously contest the judge's finding that the Government came by the new information on the eve of trial and proceeded in good faith to promptly pass it on to his counsel.[77] Rather, Anderson contends

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[75] Fed.R.Crim.P. 16(g), which was not strictly applicable to the situation, provides:

> If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

[76] See note 75, *supra*.

[77] Compare *United States* v. *Bryant*, 142 U.S.App.D.C. 132, 141, 439 F.2d 642, 651 (1971).

that the judge should have dismissed Ms. Norton as a trial witness, or should at least have granted a continuance to provide an opportunity for them to meet her "surprise" testimony. Anderson advances no reason for a complete ban on Ms. Norton's testimony, the relevance and materality of which is apparent, save that he needed time to combat it. Anderson's protest thus boils down to the position that the trial judge erred in disallowing the continuance.

Indubitably, a reasonable time for adequate preparation of the accused's defense is the first essential of trial fairness,[78] and "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality."[79] Refusal of a continuance to enable rebuttal of surprise prosecution testimony may produce these very consequences.[80] But "it is not every denial of a request for more time that violates due process," [81] nor does "the fact, standing alone, that a continuance has been denied, . . . constitute a denial of the constitutional right to assistance of counsel," [82] for "[t]he matter of continuance is traditionally within the discretion of the trial

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[78] *Unger* v. *Sarafite*, 376 U.S. 575, 588-91 (1964); *Avery* v. *Alabama*, 308 U.S. 444, 446, 453 (1940); *United States* v. *Helwig*, 159 F.2d 616, 618 (3d Cir. 1947); *United States* v. *Millican*, 414 F.2d 811, 814 (5th Cir. 1969); *United States* v. *Ploeger*, 428 F.2d 1204, 1205-06 (6th Cir. 1970).

[79] *Unger* v. *Sarafite*, *supra* note 78, 376 U.S. at 589.

[80] See *Hergenrother* v. *State*, 215 Ind. 89, 18 N.E.2d 784, 788 (1939). Compare *Lisenba* v. *California*, 314 U.S. 219, 228 (1941).

[81] *Unger* v. *Sarafite*, *supra* note 78, 376 U.S. at 589. See also *Avery* v. *Alabama*, *supra* note 78, 308 U.S. at 446.

[82] *Avery* v. *Alabama*, *supra* note 78, 308 U.S. at 446.

judge. . . ." [83] As the Supreme Court instructs, "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to deny due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." [84]

To Anderson's plea for additional time, the trial judge responded, quite correctly, that the Government was not obligated to disclose every item of Ms. Norton's expected testimony even had it been known earlier what the content of that testimony would be. The amplifications in her testimony were not exculpatory of Anderson,[85] and they did not fall within the categories of information which Rule 16(g) makes discoverable.[86] Beyond those

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[83] *Unger* v. *Sarafite*, *supra* note 78, 376 U.S. at 589. See also *Mahoney* v. *United States*, 137 U.S.App.D.C. 3, 5, 420 F.2d 253, 255 (1969). Similarly, an application for relief under Fed.R.Crim.P. 16(g) is a matter committed to the sound discretion of the trial court. *E.g.*, *Gevinson* v. *United States*, 358 F.2d 761, 766 (5th Cir.), *cert. denied*, 385 U.S. 823 (1966).

[84] *Unger* v. *Sarafite*, *supra* note 78, 376 U.S. at 589. See also *Nilva* v. *United States*, 352 U.S. 385, 395 (1957); *United States* v. *Ray*, 351 F.2d 554, 555 (4th Cir. 1965); *Stamps* v. *United States*, 387 F.2d 993, 995 (8th Cir. 1967); *Eubanks* v. *United States*, 336 F.2d 269, 270 (9th Cir. 1964).

[85] See *Brady* v. *Maryland*, 373 U.S. 83, 87-88 (1963). See also *Moore* v. *Illinois*, 408 U.S. 786, 795-97 (1972); *Giglio* v. *United States*, 405 U.S. 150, 153-54 (1972); *Giles* v. *Maryland*, 386 U.S. 66, 74 (1967); *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959); *Alcorta* v. *Texas*, 355 U.S. 28, 31-32 (1957); *Levin* v. *Katzenbach*, 124 U.S.App.D.C. 158, 162-63, 363 F.2d 287, 291-92 (1966).

[86] Fed.R.Crim.P. 16 limits compellable discovery to the defendant's written or recorded statements and confessions, the results of physical or mental examinations and scientific tests, the defendant's testimony before a grand jury, and books, papers, documents, tangible objects or places material to the preparation of his defense.

considerations, the question before the trial judge was whether admission of Ms. Norton's tardy revelations into evidence might have so affected the defensive ability of Anderson's counsel as to necessitate a continuance to enable additional preparation.[87] The judge, after a full hearing on that subject, thought not, and while the judgment is ultimately ours,[88] we must accord deference to the judge's informed discretion.[89]

We perceive no cause to upset his judgment in the matter. We can no more in retrospect see prejudice to Anderson than the judge was able to anticipate prospectively.[90] Anderson's counsel were already on notice, from the memorandum of conferences and the conversations preceding it, that the Government would undertake to prove the events to which Ms. Norton was to testify. A whole week passed between the prosecutor's disclosure of Ms. Norton's newly-found knowledge to defense counsel and the time at which she took the witness stand. Just why that did not afford the opportunity Anderson's counsel asked for is not explained. Indeed, defense witnesses, including Anderson himself, testified in explicit detail in the effort to contradict Ms. Norton's descrip-

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[87] See text *supra* at notes 78-84.

[88] See *Avery* v. *Alabama*, *supra* note 78, 308 U.S. at 447; *Pierre* v. *Louisiana*, 306 U.S. 354, 358 (1939); *Norris* v. *Alabama*, 294 U.S. 587, 590 (1935).

[89] *United States* v. *Millican*, *supra* note 78, 414 F.2d at 813; *United States* v. *Mathison*, 239 F.2d 358, 361 (7th Cir. 1956); *Torres* v. *United States*, 270 F.2d 252, 255 (9th Cir. 1959), *cert. denied*, 362 U.S. 921 (1960); *Holt* v. *United States*, 267 F.2d 497, 498-99 (8th Cir. 1959).

[90] See *United States* v. *Bentvena*, 319 F.2d 916, 935 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); *Gardiner* v. *United States*, 321 F.2d 159, 161 (5th Cir.), *cert. denied*, 375 U.S. 953 (1963); *United States* v. *Simpson*, 460 F.2d 1321, 1322 (5th Cir. 1972).

tion of disputed events and, more fundamentally, to destroy her basic credibility before the jury. In sum, the able and vigorous defense Anderson's counsel erected against Ms. Norton's "new" testimony belies any thought that Anderson was in any way harmed by the trial judge's ruling.[91]

B. *The Contempt Element*

The prosecutor admittedly had been advised by Ms. Norton's personal counsel that she would decline to answer questions going beyond the scope of her grand jury testimony. Anderson asserts that after that declaration the calling of Ms. Norton as a witness was improper and prejudicial, and that the trial judge erred in denying his motion for a mistrial on that account. We do not agree.

The present situation is quite unlike that in cases, cited by Anderson, wherein the prosecutor called a witness in full awareness that the witness would invoke his privilege against self-incrimination.[92] Here the prosecutor had brought to the trial judge's attention Ms. Norton's unwillingness to testify voluntarily, and had sought and obtained for her a grant of immunity from prosecution. Thereafter, the prosecutor had every right to demand and to expect her testimony, under compulsion by

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[91] We are advertent to the fact that Anderson's counsel did not come by the hotel bill, which was utilized as newly discovered evidence to underpin his motion for a new trial, until after the verdict was rendered. However, as we subsequently hold, that evidentiary item could hardly have affected the verdict. See Part III(C), *infra*.

[92] See *Namet* v. *United States*, 373 U.S. 179, 185-86 (1963); *Fletcher* v. *United States*, 118 U.S.App.D.C. 137, 138, 332 F.2d 724, 725 (1964); *Sanders* v. *United States*, 373 F.2d 735 (9th Cir. 1967).

the court if necessary, despite her preference to the contrary."

We perceive no impropriety in the handling of the problem by either the prosecutor or the judge, and no ground for overturning the ruling on Anderson's ensuing motion. Declaration of a mistrial in a criminal case is a step to be avoided whenever possible,[94] and one to be taken only in circumstances manifesting a necessity therefor.[95] Reluctance of a prosecution witness is not such an occasion;[96] rather, the court's duty is to secure the witness' testimony if compellable, and to give appropriate curative instructions to the jury if necessary, to restore order in the trial.[97]

In the case at bar, the trial judge, out of the jury's presence, warned Ms. Norton of the consequences of the course she was taking, and adjudged her in contempt when she persisted. The judge also instructed the jury not to draw any inference of any kind from Ms. Norton's recalcitrance, or speculate as to what Ms. Norton's additional testimony would have been. Those steps fulfilled the judge's responsibility during the period Ms. Norton remained adamant. When Ms. Norton later recanted

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[94] See *Piemonte* v. *United States*, 367 U.S. 556, 559 n.2 (1961); *Reina* v. *United States*, 364 U.S. 507, 513 (1960); *In re Flanagan*, 121 U.S.App.D.C. 368, 369, 350 F.2d 746, 747 (1965).

[95] See *United States* v. *Jorn*, 400 U.S. 470, 486 (1971). *Cf. Green* v. *United States*, 355 U.S. 184, 187-88 (1957).

[96] *Brock* v. *North Carolina*, 344 U.S. 424, 427 (1953); *Wade* v. *Hunter*, 336 U.S. 684, 690 (1949); *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

[97] *Frazier* v. *Cupp*, 394 U.S. 731, 735-36 (1969).

[97] *Frazier* v. *Cupp*, *supra* note 96, 394 U.S. at 735-36; *Carsey* v. *United States*, 129 U.S.App.D.C. 205, 207, 392 F.2d 810, 812 (1967).

and returned to the witness stand for questioning by all counsel, any threat to Anderson's Sixth Amendment rights to confrontation and cross-examination—on account of her pre-contempt testimony—was eliminated from the trial. We do not find Anderson any the worse off because of this experience, and there is no occasion for us to determine what disposition would have been called for had Ms. Norton remained steadfast in her decision to say no more.

C. *The "Perjury" Element*

The remaining prong of Anderson's attack on Betsey Norton's testimony is that it was tainted by perjury, a position Anderson derives from the following circumstances. Ms. Norton told the jury that Anderson arranged for her to travel to Kansas City to meet John Criswell so that she could identify him if asked to do so by the grand jury.[98] She further stated that she flew to Kansas City, observed him at an airport for a few minutes, and returned to Washington on the same day.[99] Anderson testified, however, that Ms. Norton was at the Muhlbach Hotel in Kansas City when he met Criswell at the airport,[100] and Criswell said that to the best of his recollection Anderson was alone at the time.[101]

After the trial had ended, Anderson's counsel came into possession of a receipted bill indicating that Ms. Norton was a guest of the Muhlbach Hotel for the night preceding the day of the airport meeting. On the basis of this discovery, and within the period extended by the trial judge for the purpose, counsel moved for a new

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[98] See text *supra* at notes 33-34.

[99] See text *supra* at note 34.

[100] See text *supra* at note 53.

[101] See text *supra* at note 54.

trial.[102] The judge denied the motion, and his action in doing so is assigned as error. The argument is that Ms. Norton's version of her part in the Kansas City incident was a deliberate falsehood vitiating the verdict of Anderson's guilt.

The knowing use of perjured testimony to secure a conviction is a denial of due process of law,[103] necessitating, of course, a new trial.[104] This is not to suggest that a new trial is in order only upon an occurrence of constitutional dimension. There is respectable authority for the proposition that a new-trial motion on the ground of false testimony, even without a claim that the prosecutor knew of the falsity, should under some conditions be granted.[105] Moreover, a new-trial motion based on

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[102] "The court on motion of a defendant may grant a new trial to him if required in the interest of justice. . . . A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period." Fed.R. Crim.P. 33.

[103] *Moore* v. *Illinois*, *supra* note 85, 408 U.S. at 797-98; *Giglio* v. *United States*, *supra* note 85, 405 U.S. at 153-54; *Miller* v. *Pate*, 386 U.S. 1, 7 (1967); *Napue* v. *Illinois*, *supra* note 85, 360 U.S. at 269; *Alcorta* v. *Texas*, *supra* note 85, 355 U.S. at 31-32; *Pyle* v. *Kansas*, 317 U.S. 213, 216 (1942); *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935).

[104] See cases cited *supra* note 103.

[105] It is said that three conditions must be satisfied before such a motion will be granted:

> (a) The court is reasonably well satisfied that the testimony given by a material witness is false. (b) That without it the jury *might* have reached a different conclusion. (c) That the party seeking the new trial was taken by surprise when the false testimony was given and

newly discovered evidence made within the seven-day period following verdict—which in federal practice is allowed for such a motion irrespective of its grounds [106]—or, as here, within an extension of that period, is to be measured in terms of "the interest of justice," [107] and not by the stricter standard applicable to motions submitted outside that time frame.[108] With these principles in mind, we examine the situation before us.

The two critical events—an overnight stay at a Kansas City hotel and a brief meeting with Criswell at a Kansas City airport the next day—are not inherently inconsistent; put another way, it was easily possible for Ms. Norton to have engaged in each. It follows that the hotel bill had no overpowering tendency to prove that Ms.

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was unable to meet it for it did not know of its falsity until after the trial.

Larrison v. *United States*, 24 F.2d 82, 87-88 (7th Cir. 1928) (emphasis in original). See also *United States* v. *Lombardozzi*, 343 F.2d 127, 128 (2d Cir.), *cert. denied*, 381 U.S. 938 (1965); *Newman* v. *United States*, 238 F.2d 861, 862 n.1 (5th Cir. 1956); *Gordon* v. *United States*, 178 F.2d 896, 900 (6th Cir. 1949), *cert. denied*, 339 U.S. 935 (1950).

[106] See note 102, *supra*.

[107] *Brodie* v. *United States*, 111 U.S.App.D.C. 170, 172-73, 295 F.2d 157, 159-60 (1961); *Benton* v. *United States*, 88 U.S. App.D.C. 158, 160, 188 F.2d 625, 627 (1951); *United States* v. *Schartner*, 285 F.Supp. 193, 196 (E.D. Pa. 1967).

[108] See, *e.g.*, *Thompson* v. *United States*, 88 U.S.App.D.C. 235, 236, 188 F.2d 652, 653 (1951), where we stated the requirements for such cases as follows:

> To obtain a new trial because of newly discovered evidence (1) the evidence must have been discovered since the trial; (2) the party seeking the new trial must show diligence in the attempt to procure the newly discovered evidence; (3) the evidence relied on must not be merely cumulative or impeaching; (4) it must be material to the issues involved; and (5) of such nature that in a new trial it would probably produce an acquittal.

Norton did not see Criswell at the airport just as she said.[109]

We are mindful of Ms. Norton's statement that she flew to Kansas City, met Criswell and returned to Washington on the same day. But the mere fact that witnesses give different testimony—and that is all we have here—is obviously insufficient to establish that either is a perjurer. That is the more so where, as here, almost two years elapsed between the airport episode and the testimony at Anderson's trial. Furthermore, as a constitutional claim Anderson's complaint fails additionally for the reason that there is not the slightest indication that the prosecutor knew that Ms. Norton testified falsely, if indeed she did.[110]

We come, then, to the question whether, as a nonconstitutional matter, the unavailability of the hotel bill at trial called so imperatively for a grant of Anderson's motion "in the interest of justice" that the trial judge's conclusion on that score should be overturned.[111] We answer that question in the negative. Failing as an instance of perjury, the inconsistencies to which Anderson adverts could only impinge upon Ms. Norton's credibility

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[109] Compare *Moore* v. *Illinois, supra* note 85, 408 U.S. at 798. The hotel bill indicates a check-out time at about 8:30 a.m. The alleged meeting with Criswell at the airport supposedly occurred no earlier than 10:00 a.m. on that day.

[110] See text *supra* at note 103. Nor do we believe that the airport identification which Ms. Norton related, even if proven false, bore such significance to Anderson's bribery trial as a whole that it "could . . . in any reasonable likelihood have affected the judgment of the jury. . . ." *Giglio* v. *United States, supra* note 85, 405 U.S. at 154, quoting *Napue* v. *Illinois, supra* note 85, 360 U.S. at 271.

[111] See text *supra* at notes 106-08.

as a witness.[112] A review of the trial record discloses, however, that even without the hotel bill Anderson was able to mount a substantial challenge to her veracity. The jury knew that she was a reluctant and ambivalent witness, and that her grand jury presentation was much less expansive than her statement at trial; the jury saw the clash of her version with a considerable volume of testimony by other witnesses. Demonstration of an additional inconsistency, particularly one of such relatively small stature as the airport story, would not likely have changed the jury's verdict. By the same token, only dubiously could a new trial for Anderson have served the interest of justice.

It is well settled that disposition of a motion for a new trial rests within the sound discretion of the trial judge, and should be disturbed only for abuse or misapplication of the law.[113] The circumstances here do not persuade us that the able trial judge was misguided in his conclusion as to the direction in which the interest of justice lay. We accordingly sustain his ruling.

IV. The Trial Events

We next examine three events occurring at Anderson's trial, which assertedly require reversal of his conviction.

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[112] The record before us does not present a *Brady*-type question. See note 85, *supra*, and accompanying text. While it clearly appears that Anderson learned of the hotel bill only after the conclusion of trial, the record makes plain that the Government did not become aware of it until it was tendered in support of the new-trial motion.

[113] *United States* v. *Johnson*, 327 U.S. 106, 111 (1946); *United States* v. *Gaither*, 142 U.S.App.D.C. 234, 236, 440 F.2d 262, 264 (1971); *Smith* v. *United States*, 124 U.S.App.D.C. 57, 58, 361 F.2d 74, 75 (1966); *Calomeris* v. *United States*, 95 U.S.App.D.C. 239, 240, 221 F.2d 111, 112 (1955).

One was a reference by a Government witness to an act of bribery attempted by Anderson some years prior to trial. Another was the trial judge's refusal to give to the jury two instructions requested by Anderson's counsel. The third was an unsuccessful challenge to the legal sufficiency of the evidence to support Anderson's conviction of bribery. We find none of these contentions a basis for upsetting the conviction.

A. *The Bribery Reference*

John Sullivan testified that when Brewster's January, 1966, visitor said that she could get campaign funds from Anderson, Brewster suggested that Anderson contact Sullivan in that regard. Somewhat surprised by Brewster's reply, Sullivan continued, after the visitor's departure he inquired of Brewster about it. Sullivan then testified that Brewster responded, "I know Cy Anderson and back when I was a Congressman he tried to bribe me and I threw him out of my office."

On objection by Spiegel's counsel, the trial judge immediately instructed the jury to limit consideration of that statement to Brewster's fate alone. Anderson now contends that the statement was an impermissible hearsay reference to another crime—a reference which he could not explore by examination of Brewster,[114] and which the judge's limiting instruction could not completely meet. We do not find in these arguments a basis for reversal.

As we have had past occasion to admonish, "evidence indicating the accused's commission of an offense not on trial, because of its potential for prejudice, is generally

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[114] Brewster, Anderson's codefendant, had not then taken the witness stand to testify, or otherwise waived his constitutional privilege against self-incrimination.

to be excluded." [115] We have consistently recognized, however, that this rule is subject to exceptions [116] which may come into operation when the probative value of the evidence outweighs its potentially harmful effect.[117] A situation possibly justifying invocation of an exception arises when other-crimes evidence tends to prove an intent which is an essential element of the offense on trial.[118]

Proof of the offense of bribery involves proof, among other things, or corrupt intent to influence or be influenced in official conduct.[119] The statement in question tended to show Brewster's prior knowledge of Anderson and Brewster's state of mind in accepting money from Anderson. So, upon a balance of that value against possible injury, the trial judge might properly have admitted the statement for the jury's consideration in connection with the bribery charges then pending against Brewster.

The greater concern, however, is not the admissibility of the statement against Brewster, but the effect of such admission upon Anderson, and in that regard Anderson lodges three complaints. One is that the state-

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[115] *Robinson* v. *United States*, 148 U.S.App.D.C. 58, 67, 459 F.2d 847, 856 (1972), and see cases there cited.

[116] *Drew* v. *United States*, 118 U.S.App.D.C. 11, 16, 331 F.2d 85, 90 (1964); *Fairbanks* v. *United States*, 96 U.S.App.D.C. 345, 347, 226 F.2d 251, 253 (1955).

[117] *Robinson* v. *United States*, *supra* note 115, 148 U.S.App. D.C. at 67-68, 459 F.2d at 856-57; *Bradley* v. *United States*, 140 U.S.App.D.C. 7, 12, 433 F.2d 1113, 1118 (1969).

[118] *E.g.*, *United States* v. *Fench*, 152 U.S.App.D.C. 325, 331, 470 F.2d 1234, 1240 (1972), *cert. denied*, 410 U.S. 909 (1973); *Drew* v. *United States*, *supra* note 116, 118 U.S.App. D.C. at 16, 331 F.2d at 90. See generally, C. McCormick, Evidence § 190 (2d ed. 1972); 2 J. Wigmore, Evidence §§ 300-373 (3d ed. 1940).

[119] See note 1, *supra*, and 18 U.S.C. § 201(c) (1970).

ment, as to Anderson, was hearsay, and with that premise we readily agree. But the statement, as a purported admission by Brewster, was not hearsay as to him, and the trial judge instructed the jury to confine to Brewster alone any use it might make of the statement. Another complaint registered by Anderson is that since, at the time of admission of the statement, Brewster could not have been examined by Anderson,[120] he was deprived of his constitutional right of confrontation.[121] That difficulty disappeared, however, when later in the trial Brewster took the witness stand himself and denied that he ever made the statement.[122] Anderson's remaining complaint is that the trial judge's limiting instruction did not give him adequate protection. We think the jury's willingness to heed instructions and its ability to keep separate the evidence against Brewster and Anderson, respectively, is amply shown by the discriminating verdicts it rendered.[123]

B. *The Requested Instructions*

At trial, Anderson's counsel requested, and the judge refused, two instructions which assertedly were essential to the jury's understanding of the theory of his defense. One would have told the jury that

> [i]t is not corrupt in itself to influence or to attempt to influence a Senator or other legislator, nor is it corrupt in itself for a Senator to be influenced in respect to his actions, vote or decision on legislation. It is a part of the duty of every Senator to pay heed to and consider

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[120] See note 114, *supra*.

[121] See *Bruton* v. *United States*, 391 U.S. 123, 126 (1968).

[122] *Nelson* v. *O'Neil*, 402 U.S. 622, 629-30 (1971); *Jackson* v. *United States*, 142 U.S.App.D.C. 19, 20, 439 F.2d 529, 530 (1970).

[123] Compare notes 6 and 9, *supra*.

> the views of all responsible parties on any matter of legislation before him.

The other request would have said that

> [a] lobbyist is a person who is paid for the purpose of attempting to influence the passage or defeat of legislation by the Congress of the United States. This is neither illegal nor improper. The only legal restriction on a lobbyist is that he or she must be properly registered with the Clerk of the House of Representatives or the Secretary of the Senate. In this case Mr. Anderson was so registered.

We think the judge properly rejected both.

We have no problem with the portion of the first request which spoke to the obligation of legislators to consider responsible views on pending legislation. But we cannot subscribe to an instruction indicating that influencing or attempting to influence a legislator in the performance of an official act cannot amount to bribery. A gift or promise of something of value with intent to exert such an influence *is* bribery;[124] the influencing is legally innocent only if unaccompanied by that factor. If Anderson's first request incorporated that qualification, it did so all too subtly,[125] and unless the qualification was clear the instruction asked for was misleading.

The second instruction Anderson sought suffers from a similar infirmity. While we do not quarrel with the accuracy as distinguished from the relevance of Anderson's general definition of a lobbyist, we encounter

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[124] See note 1, *supra*. This is so even if the recipient is not actually influenced. See Part V(A), *infra*.

[125] It may be that the words "in itself," appearing twice in the proposed instruction, were intended to qualify the broad proposition stated. The difficulty is that a layman could hardly be expected to fully grasp the significance of those words as a suitable qualificaton.

difficulty with the statement that "[t]he only legal restriction on a lobbyist is" proper registration. It may be that registration is the only precondition to lobbying, but a lobbyist is nonetheless under the same legal restrictions imposed by the bribery laws upon everybody else; in a word, that one who violates those laws is a lobbyist is no defense. Anderson's second request, like the first, could have misled the jury, and the trial judge rightly declined to give it. Certainly the profession of lobbying is honorable; just as surely, influence devoid of unlawful means is innocuous, but Anderson's instructions implied much more.

We are advertent to the consideration that, as Anderson argues, an accused is entitled to instructions addressed to his theory of the case when properly requested and framed.[126] But here the function of the lobbyist was thoroughly ventilated before the jury by Anderson's testimony, and the instructions the trial judge gave the jury adequately explained the requirement of corrupt intent—the element toward which Anderson directed his main defense —even to the extent of exonerating campaign contributions inspired by the recipient's general position of support on particular legislation. In this fashion the jury was informed of Anderson's occupational and operational background, and the judge's instructions furnished the jury with sufficient guidance to enable the distinction of lawful contributions from bribes. These circumstances considered, Anderson is not in position to urge that the judge should have done more.

C. *The Sufficiency of the Evidence*

Anderson also questions the legal sufficiency of the Government's evidence to support his conviction on

[126] See *United States* v. *Mack*, 151 U.S.App.D.C. 162, 167, 466 F.2d 333, 338, *cert. denied*, 409 U.S. 952 (1972); *Brooke* v. *United States*, 128 U.S.App.D.C. 19, 24, 385 F.2d 279, 284 (1967), and cases cited note 17 therein.

the three bribery charges. He contends, as he did on his motion for a new trial, that the Government failed to prove the specific intent prerequisite to a bribery conviction. He asserts that the evidence did no more than portray an active lobbyist who contributed funds for the reelection campaign of a financially hard-pressed legislator, both before and during an effort to assist him in the presentation of a position which he had long espoused publicly as well as in the legislature. Anderson also suggests that the Government showed at most the payment of unlawful gratuities and not bribery. We find these arguments unacceptable.

Certainly, to establish one of the elements of bribery, the Government had to prove that Anderson, directly or indirectly, corruptly gave, offered or promised something of value to Brewster, or promised Brewster that he would give something of value to some other person or entity, with intent to influence an official act.[127] We need not restate the extensive evidence introduced by the Government for that purpose—evidence we have already elaborately summarized.[128] For present purposes it suffices to note Anderson's employment by Spiegel and his duty as its lobbyist to protect its vital business interest in low third-class postal rates; Anderson's contacts, financial and otherwise, with Brewster, after a rate-increase proposal became known; the $5,000 check from the Bartenders Union, sent at Anderson's request to DCCME in January, 1966, in the understanding that Brewster would keep an "open mind" on the proposal; the $5,000 cash payment in January, 1967, during Anderson's presentation to Brewster of Spiegel's opposition to the proposal; the $4,500 cash payment in April, 1967, during a similar discussion; and the delivery in July, 1967, of Anderson's check for $5,000 with the payee

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[127] See note 1, *supra*.

[128] See Parts I(A), (B), *supra*.

blank, in lieu of the delayed Spiegel check in that amount, after Sullivan's call for another contribution. We also note that these payments were invariably associated with a communication, express or tacit, of interest in the rate-raise proposal, and in all but one instance were made from Spiegel funds.

It is not our function to retry the case, weigh the evidence, or pass on the credibility of the witnesses.[129] It is our duty to sustain the jury's verdict if there is substantial evidence, in the light most favorable to the Government, to support the jury's conclusion.[130] Here the evidence warranted the jury in finding, if so inclined, that Anderson, both directly and indirectly, gave Brewster monies originating from Spiegel with intent to influence Brewster's action on the postal-rate legislation. That intent could be derived from the nature of Anderson's communications with Brewster, from the professed interest of Anderson's client in Brewster's position, and from subterfuge—delivering two large cash payments—in negotiating two Spiegel checks, and in preparing Betsey Norton for the grand jury.[131] We hold that the evidence was legally sufficient to enable conviction.[132]

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[129] *E.g., Johnson* v. *United States*, 138 U.S.App.D.C. 174, 768, 426 F.2d 651, 655 (*en banc* 1970), *petition for cert. dismissed*, 401 U.S. 846 (1971).

[130] *Glasser* v. *United States*, *supra* note 61, 315 U.S. at 80; *Crawford* v. *United States*, 126 U.S.App.D.C. 156, 158, 375 F.2d 332, 334 (1967); *Curley* v. *United States*, 81 U.S.App. D.C. 389, 392, 160 F.2d 229, 232, *cert. denied*, 331 U.S. 837 (1947).

[131] See, *e.g., United States* v. *Egenberg*, 441 F.2d 441, 443 (2d Cir.), *cert. denied*, 404 U.S. 994 (1971); *United States* v. *DeAlesandro*, 361 F.2d 694, 699 (2d Cir.), *cert. denied*, 385 U.S. 842 (1966).

[132] Compare *Nye & Nissen, Inc.* v. *United States*, 336 U.S. 613, 619 (1949); *United States* v. *Lumpkin*, 145 U.S.App.D.C.

V. The Post-Verdict Events

There remain for consideration two additional arguments by Anderson. One is that his conviction of bribery is fatally inconsistent with Brewster's conviction of receiving unlawful gratuities. The other is that the imposition of consecutive sentences was legally erroneous. Like Anderson's other contentions on this appeal, we find these claims unavailing.

A. *The Brewster Verdict*

While the jury found Anderson guilty of bribery, it acquitted Brewster of that offense and fixed his guilt instead at unlawful receipt of gratuities.[133] Anderson claims that these verdicts are fatally inconsistent, and that reversal of his conviction is accordingly required. He argues that the Government's evidence details such a course of conduct between Brewster and himself that no distinction between their acts or intent could rationally be drawn. He reasons that in the presence of such factual similarity the jury erred in finding that he corruptly intended to give money to Brewster to influence his official action, but that Brewster lacked a corresponding intent in the receipt of such monies.

We note initially that inconsistent verdicts are not self-vitiating.[134] Beyond that, the verdicts as to Anderson and Brewster, respectively, are not per se inconsistent. The payment and the receipt of a bribe are not interdependent offenses,[135] for obviously the donor's in-

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162, 167, 448 F.2d 1085, 1090 (1971); *Long* v. *United States*, 124 U.S.App.D.C. 14, 20 360 F.2d 829, 835 (1966).

[133] *United States* v. *Brewster*, *supra* note 7, at 8.

[134] *United States* v. *Fox*, 140 U.S.App.D.C. 129, 132, 433 F.2d 1235, 1238 (1970), and cases there cited.

[135] *United States* v. *Brewster*, *supra* note 7, at 18; *United States* v. *Michelson*, 165 F.2d 732, 733 (2d Cir.), *aff'd*, 335

tent may differ completely from the donee's. Thus the donor may be convicted of giving a bribe despite the fact that the recipient had no intention of altering his official activities, or even lacked the power to do so.[136]

As ever so recently we recognized, these mental elements are the factors differentiating the offense of bribery from the lesser offense of unlawfully receiving gratuities.[137] Here, on the evidence, the jury could reasonably conclude that Anderson gave Brewster monies with corrupt intent to influence his vote on the proposed rate-increase legislation, and that Brewster, though insensitive to any influence, accepted the monies with knowledge that Anderson's purpose was to reward him for his stance on such legislation.

B. *The Sentences*

The trial judge imposed separate sentences on each of the three counts upon which Anderson was convicted, and expressly directed that the terms of imprisonment and fines operate consecutively and cumulatively.[138] The allegations of these counts were similar, differing only as to dates and amounts of alleged payments to Brewster. Anderson contends that at best the Government's evidence showed that his dealings with Brewster were all part and parcel of a single design—in his words, "three installments of the same transaction" [139]—with the

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U.S. 469 (1948). See also *Egan* v. *United States*, 52 App. D.C. 384, 388, 287 F. 958, 962 (1923).

[136] *United States* v. *Hall*, 245 F.2d 338, 339 (2d Cir. 1957); *Wilson* v. *United States*, 230 F.2d 521, 526 (4th Cir.), *cert. denied*, 351 U.S. 931 (1956); *United States* v. *Troop*, 235 F.2d 123, 124-25 (7th Cir. 1956).

[137] *United States* v. *Brewster*, *supra* note 7, at 17-20.

[138] See note 59, *supra*.

[139] Brief for Appellant at 42.

result that consecutive sentences were improper. We disagree.

The principles guiding our decision have been fully staked out. "[T]he statutes are first examined to ascertain if they will bear interpretation as creating separate offenses. If so, the court then inquires whether Congress also intended 'to pyramid the penalties' or only to establish a different degree or type of offense."[140] The solutions to these questions—the appropriate unit of prosecution and the appropriate mode of sentencing—are first to be sought in the intention of the legislature.[141] We think the legislative history of the bribery statute under which Anderson was convicted requires an affirmative answer to each of the questions.

The statute was enacted in 1962,[142] and in it Congress consolidated former bribery and unlawful-gratuity laws into one.[143] Concomitantly, in companion statutes,

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[140] *Ingram* v. *United States*, 122 U.S.App.D.C. 334, 335, 353 F.2d 872, 873 (1965), quoting *Prince* v. *United States*, 352 U.S. 322, 327 (1957). See also cases cited *infra* notes 141, 149.

[141] As to multiple convictions, see *United States* v. *Maude*, 156 U.S.App.D.C. 378, 393, 481 F.2d 1062, 1077 (1973); *United States* v. *Alexander*, 152 U.S.App.D.C. 371, 379, 471 F.2d 923, 931, *cert. denied*, 409 U.S. 1044 (1972). As to consecutive sentences, see *Heflin* v. *United States*, 358 U.S. 415, 419-20 (1959); *Ladner* v. *United States*, 358 U.S. 169, 177-78 (1958); *Bell* v. *United States*, 349 U.S. 81, 82-83 (1955). When the legislative will is obscure, other canons come into play. *E.g.*, *Bell* v. *United States*, *supra*, 349 U.S. at 84. We do not reach the latter in this case.

[142] Act of Oct. 23, 1962, Added Pub.L. No. 87-849, 76 Stat. 1119. In respects not material to this case, the statute was amended by Act of Sept. 22, 1970, Pub.L. No. 91-405, tit. II, § 204(d)(2), 84 Stat. 853.

[143] See S.Rep. No. 2213, 87th Cong., 2d Sess. 7 (1962); H.R. Rep. No. 748, 87th Cong., 1st Sess. 6 (1961).

Congress extensively regulated payments to public officers and conflicts of interst.[144] The congressional objective was broad,[145] hardly less comprehensive than that inspiring forerunning legislation.[146] Very significantly, Congress specifically noted that enactment of the consolidated statute was not designed to narrow judicial interpretations of earlier bribery statutes, but rather to assure that the scope of those interpretations would be accorded universal application.[147] Under prior bribery laws consecutive sentences for payments individually made for the single purpose of influencing the same person had been upheld.[148]

We think the same treatment is a permissible alternative under the present statute. Congress has decided that bribery and kindred practices imperil the very nature of democratic government. It has legislated a vigorous attack on those practices. The only intention we can reasonably ascribe to Congress is that bribers may be punished separately for separate acts of

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[144] See 18 U.S.C. §§ 202-09 (1970).

[145] "The proper operation of a democratic government requires that officials be independent and impartial; that Governmental decisions and policy be made in the proper channels of the governmental structure; that public office not be used for personal gain; and that the public have confidence in the integrity of its government." H.R. Rep. No. 748, 87th Cong., 1st Sess. 5-6 (1961).

[146] See S.Rep. No. 2213, 87th Cong., 2d Sess. 5 (1962); H.R. Rep. No. 748, 87th Cong., 1st Sess. 3 (1961).

[147] See S.Rep. No. 2213, 87 Cong., 2d Sess. 7 (1962); H.R. Rep. No. 748, 87th Cong., 1st Sess. 6 (1961).

[148] *Biddle* v. *Wilmot*, 14 F.2d 505, 507 (8th Cir. 1926). See also *Egan* v. *United States*, *supra* note 135, 52 App.D.C. at 388, 287 F. at 962; *United States* v. *Michelson*, *supra* note 135, 165 F.2d at 733; *Patton* v. *United States*, 42 F.2d 68, 69 (8th Cir. 1930).

bribery.[149] We note, too, that courts construing other bribery laws have discarded the "installment" theory of bribery [150] in favor of the view that each bribe warrants a separate penalty.[151] We are persuaded to the same action here.

And so we conclude our review. Upon careful consideration of Anderson's contentions in light of the record, we have found no error. For the reasons stated herein, the judgment of his conviction has been affirmed.[152]

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[149] Compare *Gore* v. *United States*, 357 U.S. 386, 391 (1958); *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932).

[150] See text *supra* at note 139.

[151] See *United States* v. *Cohen*, 384 F.2d 699, 700 (2d Cir. 1967); *United States* v. *Alaimo*, 297 F.2d 604, 606 (3d Cir. 1961), *cert. denied*, 369 U.S. 817 (1962); *United States* v. *Donovan*, 339 F.2d 404, 410 (7th Cir.), *cert. denied*, 380 U.S. 975 (1965). *Cf. Badders* v. *United States*, 240 U.S. 391, 394 (1916); *Ebeling* v. *Morgan*, 237 U.S. 625, 630 (1915); *United States* v. *Brown*, 36 F.R.D. 207, 208 (D.D.C. 1964).

[152] See text *supra* following note 59.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1974

No. 73-1304

Criminal 1872-69

UNITED STATES OF AMERICA

v.

CYRUS T. ANDERSON, *Appellant*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: TAMM, ROBINSON and WILKEY, Circuit Judges

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam

For the Court

/s/ HUGH E. KLINE
Hugh E. Kline, Clerk

An opinion will follow at a later date.

APPENDIX B

Judgment and Commitment and Fine (Rev. 2-68)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

#2—CYRUS T. ANDERSON

On this 2nd day of February, 1973 came the attorney for the government and the defendant appeared in person and by counsel, Walter J. Bonner, Esq.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of BRIBERY OF A PUBLIC OFFICIAL. VIOLATION: TITLE 18, UNITED STATES CODE, SECTION 201(b) as charged in Counts 2, 4 and 6 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of NOT LESS THAN SIX (6) MONTHS AND NOT MORE THAN EIGHTEEN (18) MONTHS ON EACH OF THE COUNTS TWO, FOUR AND SIX AND DEFENDANT SHALL PAY A FINE OF TEN THOUSAND DOLLARS ($10,000.00) ON EACH COUNT (TOTAL $30,000.00). THE SENTENCE IMPOSED ON COUNT FOUR IS TO RUN CONSECUTIVELY TO THE SENTENCE IMPOSED ON COUNT TWO AND THE SENTENCE IMPOSED ON COUNT SIX IS TO RUN CONSECUTIVELY TO THE SENTENCE IMPOSED ON COUNTS TWO AND FOUR.

Indictment filed before 8-1-72.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

GEORGE L. HART, JR.
United States District Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

CYRUS T. ANDERSON, *Petitioner*

v.

UNITED STATES OF AMERICA

MOTION TO WAIVE TIMELINESS OF FILING OF PETITION FOR A WRIT OF CERTIORARI

Petitioner, Cyrus T. Anderson, by his undersigned attorneys, respectfully moves the Court to waive the timeliness of filing of the attached petition for a writ of certiorari. In support of this motion, counsel state the following:

1. This petition for a writ of certiorari is from the judgment of the Court of Appeals for the District of Columbia Circuit entered on November 12, 1974, a copy of which is attached to the petition as Appendix A.[1] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).[2]

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[1] The court of appeals initially filed an order affirming the trial court on October 22, 1974. On petitioner's motion, the court of appeals subsequently directed that the date its opinion was entered, November 12, 1974, be used to calculate the period for post-appeal actions in the court of appeals and this Court.

[2] That statute provides that "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after redition of judgment or decree; * * *."

2. Congress has not provided a time limitation in which a petition for a writ of certiorari must be filed from the court of appeals in a federal criminal case. See 28 U.S.C. 2101[3] However, this Court has provided in its rules that such a petition must be filed within thirty-days of the judgment appealed from. Rule 22(2). This time may be extended upon motion for an additional thirty-day period. *Ibid.*

It is well-settled, however, that the time provisions of Rule 22 are not jurisdictional, so that the Court may consider a petition filed more than thirty days after the judgment sought to be reviewed. *Taglianetti* v. *United States*, 394 U.S. 316, n.1; *Heflin* v. *United States*, 358 U.S. 415, 418, n.7; see generally Stern & Gressman, *Supreme Court Practice*, pp. 242-245 (4th ed., 1969). Such untimely filing does not, therefore, preclude the Court from exercising its discretionary certiorari jurisdiction, for "Rule 22(2) is not jurisdictional or mandatory and may be waived by this Court under proper circumstances * * *." *Hicks* v. *District of Columbia*, 383 U.S. 252, 253 (Douglas, J., dissenting).

3. Because the judgment which petitioner seeks to have reviewed was entered on November 12, 1974, the petition for a writ of certiorari was due for filing on December 12, 1974. Prior to that time, counsel for

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[3] Where the time limit for filing a petition for a writ of certiorari is prescribed by statute, this Court has held that the timely filing is jurisdictional, and that an untimely petition "must * * * be denied for want of jurisdiction." *Department of Banking* v. *Pink*, 317 U.S. 264, 268. As indicated below, this is not true where the time limitations are prescribed by the Court itself. 28 U.S.C. 2101(d) authorizes the Court to prescribe time limitations for filing a writ of certiorari to review a judgment "of a State court in a criminal case"; apparently by oversight, no such power is expressly conferred in cases involving federal criminal appeals.

petitioner filed a motion with the court of appeals, asking that court to stay its mandate until January 2, 1975 to permit the filing of a petition for a writ of certiorari. The court of appeals granted this motion.

Counsel for petitioner intended to file a motion with this Court, pursuant to Rule 22(2), extending the time for filing the petition for thirty-days, or until January 11, 1975. Simply for no other reason than clerical inadvertence, this motion was not filed, and counsel preparing the petition—unaware of this—assumed that the time would be extended for filing the petition. This motion would have recited the fact that petitioner was giving an extended consideration to whether to file the petition, and had been briefly discussing any further trial proceedings with the government.

4. The petition, while untimely, has been filed well-before expiration of the thirty-day period of permissible extension contained in Rule 22(2). Moreover, it raises, we believe, a substantial issue involving the validity of trying petitioner before a jury composed of persons who have volunteered to hear the case. The petition thus raises an issue which is far from frivolous, and which the court is not precluded from considering by reason of want of jurisdiction. It would disserve both the petitioner and the interests of justice to deny the petition solely because it was filed a few weeks beyond the time specified in Rule 22(2).

This Court has often considered petitions filed beyond the time specified in Rule 22(2), even where the petitioner has not offered any explanation for the untimely filing. See cases collected in Stern & Gressman, *supra*, at pp. 243-244. Certainly the inadvertent clerical error involved here justifies consideration of

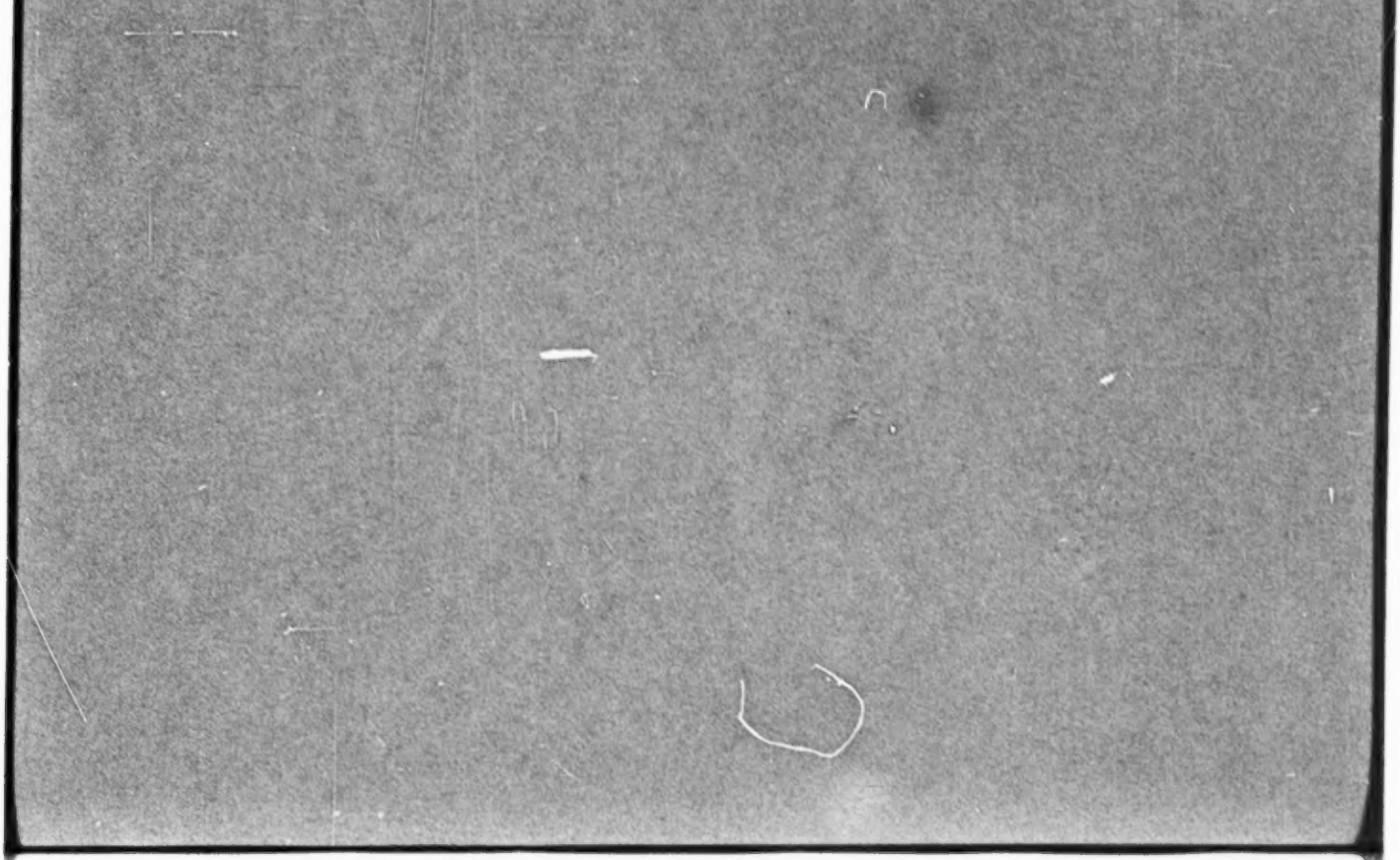
the petition more so than the unexplained tardy filings that the Court has reviewed. This is particularly true since "the petition is otherwise meritorious * * *." *Id.*, at 245. [4]

For these reasons, petitioner respectfully moves this Court to waive the timeliness of the filing of the petition for a writ of certiorari,

Respectfully submitted,

WALTER J. BONNER
WILLIAM D. APPLER
Counsel for Petitioner

[4] In addition, it may well be that the Solicitor General will not interpose the timeliness objection in this case, as he has not done so in some other cases.



In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-827

CYRUS T. ANDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that he was deprived of his Sixth Amendment right to an impartial jury when the district court selected the jury from among a group willing to extend its service to hear a lengthy trial; (2) that the court improperly admitted evidence of another similar offense; and (3) that he was not given sufficient warning of the anticipated testimony of a government witness.

After a jury trial in the United States District Court for the District of Columbia, petitioner was convicted on three counts of bribing Daniel Brewster, a United States

Senator, in violation of 18 U.S.C. 201(b).[1] He was sentenced to consecutive terms of six to eighteen months' imprisonment and fined $10,000 on each count. The court of appeals affirmed and entered judgment on November 12, 1974 (Pet. App. 1a-42a). The petition for a writ of certiorari was filed on January 2, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court. In any event there is no reason to grant the writ.

The evidence, which is not here in dispute, is set forth in the opinion of the court of appeals. It showed "the execution of a scheme designed to route payments from Spiegel through Anderson to Brewster and to a nominal campaign committee" set up for Brewster (Pet. App. 4a), in order to influence Brewster's action on postal legislation. The principal evidence against petitioner came from John Sullivan (a former Brewster aide) and Betsey Shipley Norton (a close friend of petitioner).

1. Petitioner asserts that he was tried by a "volunteer" jury, and that this jury could not have represented a cross-section of the community. At a pre-trial conference on October 27, 1972, the trial judge told counsel that Monday, October 30, the date on which trial was set, also was the last day of normal jury service, and that because he would have to grant any request by a juror to be excused, he had caused the question to be asked in the Jury Lounge as to who would be willing to serve on a

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[1]Petitioner, a registered lobbyist, was tried jointly with former Senator Brewster and with Spiegel, Inc., petitioner's employer. Spiegel, Inc., pleaded guilty during the trial to two counts of giving an unlawful gratuity, in violation of 18 U.S.C. 201(f). Brewster was convicted on three counts of the lesser included offense of accepting illegal gratuities, in violation of 18 U.S.C. 201(g). The court of appeals reversed Brewster's conviction, 506 F.2d 62, on grounds not pertinent to this appeal. The government is preparing to retry Brewster.

case, which was not identified, that would take about two weeks to try. Sixty-eight of the potential jurors had replied affirmatively, and the balance of two or three hundred had declined. The judge then asked counsel if they objected to this procedure (App. 60). Mr. Bonner, petitioner's counsel, stated (*ibid.*):

> It occurs to me, Judge Hart, and it just occurs to me, I will abide by the majority vote of defense counsel, it might be best to start with a new jury on Tuesday.

Mr. O'Connell, another defense counsel, then asked if the 68 were "all volunteers and not employed" (App. 60-61). Mr. Bonner asked to discusss the matter with the other defense counsel before making a decision. The trial judge said that he intended to use the pool of 68 unless counsel made a claim that it would prejudice them, because otherwise he would have to ask the larger panel the same question individually, and would grant their requests to be excused (App. 61). Mr. Bonner responded (*ibid.*):

> I am not suggesting that, Judge Hart. I am suggesting to my brother defense counsel we might consider the new jury where we wouldn't have that problem. I don't know whether they would prefer the old jury.

Defense counsel had ample opportunity to consider the jury question and to object, either then or on the first day of trial, three days later. They did neither. We submit that petitioner cannot now object to the composition of the jury panel when he failed to do so at trial.[2]

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[2]This is, therefore, an inappropriate case in which to reconsider *Frazier* v. *United States*, 335 U.S. 497, which supports the result reached below.

In any event, petitioner's claim that this procedure denied an impartial jury was correctly answered by the court below, on whose opinion we rely (Pet. App. 15a-17a):

> To be sure, Anderson was entitled to a trial by a jury selected from a body truly representative of the community. However, his characterization of the composition of the jury panel utilized in this case is far from accurate. There is not the slightest hint that the October complement of jurors—from which came the 60-member panel, and ultimately the jury for his trial—was other than a fair cross-section of residents of the District of Columbia. Neither the panel nor the trial jury became any the less so by reason of the technique the judge employed. To say, as Anderson does, that the trial jurors had no responsibilities in competition with jury service is to indulge in speculation in an area wherein proof is an indispensable prerequisite. Moreover, jury service in this age involves almost inevitably some sacrifice of personal pursuits; without people willing to devote some of their time and energy, the jury system would grind to a halt. The traditional response of the populace to the call to this public duty belies the notion that those who respond have nothing else of importance to do.
>
> Nor, by our understanding, was the trial judge's methodology in this case an appeal to the outgoing body of jurors for volunteers. The effort, rather, was to avoid imposition of an unexpected burden upon jurors who could ill afford to continue beyond the period for which they had been summoned to serve. Certainly the judge would have been justified in excluding any of those in the 200-odd category who might

> individually have shown undue hardship, even during the term of regular service. Here the endeavor was to eliminate the tedious process of examining one by one the obviously large group who would seek to be excused for that reason.
>
> In separating those who could from those who could not afford to expand their service, the judge did not exclude anyone or any cognizable group. The sole criterion he employed was ability to serve longer; the panel from which the jury was drawn was distinguished only by that quality. We think a trial judge's discretion in jury selection is broad enough to encompass consideration of adverse consequences which might be suffered by jurors suddenly called to a duty prolonged materially beyond their original expectations. [Footnotes omitted.]

2. Government witness Sullivan testifed that in late 1965 a particular fund raiser had suggested petitioner as a source of funds for the approaching political campaign of Senator Brewster. When the fund raiser told Brewster that she would have petitioner call him, Brewster replied that she should have him call Sullivan instead. When, after the fund raiser's departure, Sullivan asked Brewster why he did that, Brewster replied: "I know Cy Anderson and back when I was a Congressman he tried to bribe me and I threw him out of my office" (App. 128). In response to an objection on behalf of Spiegel the court instructed the jury (App. 129):

> Ladies and gentlemen of the jury, that particular statement is admitted only as it relates to Senator Brewster and not as it relates to Spiegel or Anderson.

Spiegel moved for a mistrial, which was denied (App. 129). No objection or motion of any kind was made by petitioner's counsel.

In any event, petitioner's contention that this testimony was impermissibly considered against him was answered by the court below (Pet. App. 31a-32a):

> The statement in question tended to show Brewster's prior knowledge of Anderson and Brewster's state of mind in accepting money from Anderson. So, upon a balance of that value against possible injury, the trial judge might properly have admitted that statement for the jury's consideration in connection with the bribery charges then pending against Brewster.
>
> The greater concern, however, is not the admissibility of the statement against Brewster, but the effect of such admission upon Anderson, and in that regard Anderson lodges three complaints. One is that the statement, as to Anderson, was hearsay, and with that premise we readily agree. But the statement, as a purported admission by Brewster, was not hearsay as to him, and the trial judge instructed the jury to confine to Brewster alone any use it might make of the statement. Another complaint registered by Anderson is that since, at the time of admission of the statement, Brewster could not have been examined by Anderson, he was deprived of his constitutional right of confrontation. That difficulty disappeared, however, when later in the trial Brewster took the witness stand himself and denied that he ever made the statement. Anderson's remaining complaint is that the trial judge's limiting instruction did not give him adequate protection. We think the jury's willingness to heed instructions and its ability to keep separate the evidence against Brewster and Anderson, respectively, is amply shown by the discriminating verdicts it rendered. [Footnotes omitted.]

We add that once Brewster took the stand, dissipating any confrontation clause problem, the hearsay testimony became fully admissible against petitioner as well. The government was required to demonstrate petitioner's specific intent to influence Brewster, and Brewster's alleged statement, if it occurred, was highly probative on the question of Anderson's knowledge and intent. Petitioner had ample opportunity to cross-examine Sullivan and Brewster and thereby shed light on whether Brewster made the statement implicating petitioner.

3. Finally, petitioner contends that he was deprived of a fair trial because knowledge of the "devastating" testimony by the witness Betsey Norton was communicated to him only shortly before trial. The opinion of the court of appeals summarized the salient facts surrounding Norton's testimony. Prior to trial there had been a series of discussions, in lieu of pre-trial discovery, which had been summarized in a jointly prepared "memorandum of conferences" (App. 41-51). This memorandum stated that the testimony of Norton would be relatively insignificant. On the Saturday before the Monday trial, however, the prosecutor learned that Norton possessed knowledge far more extensive than previously believed. He informed defense counsel of this on Sunday. The trial court found that the government had acted in good faith in forwarding this information to the defense as soon as practicable and pointed out that in any event Fed. R. Crim. P. 16 does not compel the government to make such information available to the defense.

A full week elapsed after this disclosure before Norton took the stand. After she testified, several witnesses, including petitioner himself, testified in contradiction to her version of events. Petitioner was not harmed by the ruling denying him a continuance (Pet. App. 18a-23a). As the court of appeals put it (Pet. App. 22a-23a):

> A whole week passed between the prosecutor's disclosure of Ms. Norton's newly-found knowledge to defense counsel and the time at which she took the witness stand. Just why that did not afford the opportunity Anderson's counsel asked for is not explained. Indeed, defense witnesses, including Anderson himself, testified in explicit detail in the effort to contradict Ms. Norton's description of disputed events and, more fundamentally, to destroy her basic credibility before the jury. In sum, the able and vigorous defense Anderson's counsel erected against Ms. Norton's "new" testimony belies any thought that Anderson was in any way harmed by the trial judge's ruling. [Footnote omitted.]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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